Petition

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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PERMANENT LABEL CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented

1. Is the National Labor Relations Board, in applying the criteria established in *Gissel,* required to articulate its findings as to the conduct engaged in by an employer which requires the imposition of a bargaining order as opposed to an order directing a new election?

2. In imposing a bargaining order in a Category II *Gissel* case, may the National Labor Relations Board rely upon pre-majority misconduct in reaching the necessary conclusion that the employer's unfair labor practices undermined the Union's majority strength.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT:	
I—The decision below conflicts with decision of other circuits applying the criteria and requirements of Gissel for the imposition of a bargaining order	4
A. The Board's decision as enforced by the Third Circuit seeks to substitute judicial inference for the findings required by Gissel before a bargaining order may be imposed	7
B. The Board has failed to disclose whether it relied upon pre-majority misconduct, thus compounding the Court's error of engaging in inference and of failing to require an articulation of the Board's reasons for imposing a bargaining order	10
II—The writ should be granted to end a conflict among circuits	12
CONCLUSION	15

PAGE

APPENDIX A:

Opinion of the Court of Appeals (Filed January 8, 1981) 1a

Order for Rehearing 34a

Opinion of the Court of Appeals (Filed June 30, 1981) 36a

APPENDIX B:

Order of the National Labor Relations Board Amending Decision and Order 83a

Decision and Order of the National Labor Relations Board, 248 NLRB No. 21 ..... 85a

Decision of the Administrative Law Judge 92a

APPENDIX C:

Judgment of the Court of Appeals 186a

APPENDIX D:

28 U.S.C. Section 1254(1) 188a

Section 10(f) of the National Labor Relations Act, as amended, 29 U.SC. 160(f) 189a

National Labor Relations Act, as amended, 29 U.S.C. Section 158(a)(1), (3), (4) and (5) 190a

PAGE

Cases Cited

Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., et al., 419 U.S. 281 (1974), reh. den., 420 U.S. 956 (1975) 8, 9

Frito-Lay, Inc. v. NLRB, 585 F.2d 62 (3rd Cir. 1978) 13

Hedstrom Co. v. NLRB, 558 F.2d 1137 (3rd Cir. 1977), cert. denied, 101 S.Ct. 1699 (1981) 5, 13

Hill York Corp. v. American International Franchises, Inc., et al., 448 F.2d 680 (5th Cir. 1971) 9

Kenworth Trucks v. NLRB, 580 F.2d 55, enforced on rehearing, 580 F.2d 61 (3rd Cir. 1978) 5,13

New Alaska Development Corp. v. NLRB, 441 F.2d 491 (7th Cir. 1971) 14

NLRB v. American Cable Systems, Inc., 427 F.2d 446 (5th Cir. 1970), cert. denied, 400 U. S. 957 (1970) 14, 15

NLRB v. Armcor Industries, Inc., 98 LRRM 2441 (1978), aff'd on rehearing, 588 F.2d 821 (3rd Cir. 1978) 13

NLRB v. Armcor Industries, 535 F.2d 239 (3rd Cir. 1976) 5, 13

NLRB v. Colonial Knitting Corp., 464 F.2d 949 (3rd Cir. 1972) 13

NLRB v. Craw, 565 F.2d 1267 (3rd Cir. 1977) 5, 13

NLRB v. Daybreak Lodge Nursing and Convalescent Home, Inc., 585 F.2d 79 (3rd Cir. 1978) 13

NLRB v. Eagle Material Handling, Inc., 558 F.2d 160 (3rd Cir. 1977) 5

PAGE

NLRB v. Easton Packing Co., 437 F.2d 811 (3rd Cir. 1971) 13

NLRB v. Gissel Packing Co., Inc., 395 U.S. 575 (1969) ..... i, 4-8, 10-14

NLRB v. Juaniata Packing Co., 464 F.2d 153 (3rd Cir. 1972) 13

NLRB v. Rexair, Inc., 646 F.2d 249 (6th Cir. 1981) 14

Rapid Manufacturing Co. v. NLRB, 612 F.2d 144 (3rd Cir. 1979) 11

SEC v. Chenery Corp., 332 U.S. 194 (1947) 6

Statutes Cited

28 U.S.C.:

Sec. 1254 (1) 2

29 U.S.C. (National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519):

Sec. 8(a) (1) 2, 3

Sec. 8(a) (3) 2, 3

Sec. 8(a) (4) 2, 3

Sec. 8(2) (5) 2, 3

Sec. 10(e) 3

Sec. 10(f) 2

NO.

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PERMANENT LABEL CORPORATION,

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v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, Chief Justice and Associate Justices of the United States Supreme Court:

Petitioner, Permanent Label Corporation, prays that a writ of certiorari issue to review the decision and order of the United States Court of Appeals for the Third Circuit enforcing an order of the National Labor Relations Board.

Opinions Below

The opinion of the Court of Appeals for the Third Circuit as to which certiorari is sought (Appendix A at 36a) is reported at 657 F.2d 512 (3rd Cir. 1981). The initial opinion of the Third Circuit, is reported at F.2d , 106 LRRM 2211 (3rd Cir. 1981) (Appendix A at 1a). The underlying Decision and Order of the National Labor Relations Board is reported at 248 NLRB 118 (1980) (Appendix B at 83a).

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit as to which certiorari is sought was entered on August 14, 1981. This petition is filed pursuant to Section 10(f) of the National Labor Relations Act, as amended, 29 U.S.C. 160(f) and 28 U.S.C. Section 1254(1).

Statutory Provisions Involved

The statutory provisions pertinent to this petition are Sections 8(a)(1), (3), (4) and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), (3), (4) and (5). (Appendix D)

Statement of the Case

This case arose from a charge filed by District 65, Distributive Workers of America (herein called the "Union")[1] initially alleging a violation of Sections 8(a)(1) and (3)

[1] Now "District 65, United Auto Workers".

of the Act (Case No. 22-CA-8027). Subsequently, the charge in Case No. 22-CA-8027 was amended to include alleged violations of Sections 8(a)(4) and (5) of the Act.

On November 14, 1977 the Union filed a petition in Case No. 22-RC-7335, seeking certification as the collective bargaining representative of all employees employed by the petitioner at its Clifton, New Jersey facility with the usual statutory exclusions. Pursuant to a Stipulation for Certification upon Consent Election, an election was conducted on December 30, 1977, resulting in 54 votes having been cast for Union representation and 65 against.

Pursuant to a consolidated complaint alleging violations of Sections 8(a)(1), (3), (4) and (5) of the Act, a hearing was held before Administrative Law Judge Herzel H.E. Plaine on June 15, 16, 20, 21, 22 and 23, and August 22, 23 and 24, 1978 at Newark, New Jersey. On October 9, 1979, Administrative Law Judge Plaine issued his Decision and Recommended Order finding a violation of the Act as alleged in the Complaint and recommending a bargaining order. Timely exceptions were filed by petitioner. On March 13, 1980 the Board issued its Decision and Order in this matter affirming the rulings, findings and conclusions of the Administrative Law Judge (without substantial comment) and adopting his Recommended Order with certain modifications not relevant to this petition (Appendix B at 92a).

The court of appeals, acting upon the Board's petition for enforcement pursuant to Section 10(e) of the Act, 29 U.S.C. 160(e), initially affirmed the Board's order and directed petitioner to cease and desist from certain unfair labor practices and to provide back pay to certain employees. However, the court refused to enforce the Board's order in so far as it required petitioner to bargain with the union. The court of appeals remanded the

case with directions to the Board that it articulate why traditional remedies would not assure the fairness in a re-run election (Appendix A at 16a). The Board did not comply with the remand but instead petitioned for a rehearing en banc. The court granted the Board's petition and vacated its Order (Appendix A at 34a). Following rehearing en banc, the court of appeals granted full enforcement of the Board's order (Appendix A at 53a). The court's judgment was entered on August 14, 1981 (Appendix C).

REASONS FOR GRANTING THE WRIT

I. The decision below conflicts with decisions of other circuits applying the criteria and requirements of *Gissel* for the imposition of a bargaining order.

In *NLRB* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), this Court established a three tiered methodology governing the appropriateness of a bargaining order in cases where unfair labor practices have occurred in the context of an organizing campaign. Category I involves a case wherein an employer has committed unfair labor practices of "such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had". 395 U.S. at 614 A bargaining order is appropriate in such a case. Category II[2] involves "less extraordinary cases marked by less pervasive practices which nevertheless still have the tendency to undermine majority strength

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[2] The court below regarded the case *sub judice* as a Category II case. See majority slip op., n. 1 (Appendix A at 47a-48a), and dissenting slip op. (Appendix A at 70a).

and impede the election process". 395 U.S. at 614[3] In order to impose a bargaining order in a Category II case it must first be shown that at one point the union enjoyed a majority. Then the Board must analyze

> ". . . the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight in that employee sentiment once expressed through cards, would, on balance, be better protected by a bargaining order, then such an order should issue" 395 U.S. at 614-615.

Thus, by reasoned analysis, the Board must decide that a bargaining order is necessary because traditional remedies are insufficient to assure a fair election. This Court, in *Gissel,* and thereafter the Third Circuit, prior to its decision in the instant case,[4] has required the Board to make such a determination in a manner consistent with well

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[3] Category III involves ". . . minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order" 395 U.S. at 615.

[4] See *Kenworth Trucks* v. *NLRB,* 580 F.2d 55, 59-60 (3rd Cir. 1978); *NLRB* v. *Crow,* 565 F.2d 1267, 1271-72 (3rd Cir. 1977); *NLRB* v. *Eagle Material Handling, Inc.,* 558 F.2d 160, 166-68 (3rd Cir. 1977); *Hedstrom Co.* v. *NLRB,* 558 F.2d 1137 (3rd Cir. 1977), cert. denied, 101 S. Ct. 1699 (1981); and *NLRB* v. *Armcor Industries, Inc.,* 535 F.2d 239 (3rd Cir. 1976). See also note 6, *infra.*

settled tenets of this Court as well as fundamental rules of administrative law.

> "It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, 'we must know what a decision means before the duty becomes ours to say whether it is right or wrong'. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947)

In the decision below, the court enforced the Board's bargaining order notwithstanding the fact that the Board and the administrative law judge failed to engage in the analysis required by this Court in *Gissel*. Moreover, it has done so despite the failure of the Board to reveal whether it relied upon pre-majority conduct, post-majority conduct or a combination of both in concluding that the employer's conduct has undermined the union's majority status and destroyed the laboratory conditions necessary to a new election.

The Court has not addressed these questions since its 1969 decision in *Gissel*. Should it decline to do so now, the circuits will continue to go their individual ways leaving this critical area of board law unsettled and in conflict throughout the nation. Certainly, therefore, the stability of national labor policy, which is a principle objective of the Act, requires that the Court hear and determine the issues raised by this petition.

A. The Board's decision as enforced by the Third Circuit seeks to substitute judicial inference for the findings required by *Gissel* before a bargaining order may be imposed.

In considering the appropriateness of the issuance of any bargaining order, one must begin with the premise that Board-imposed bargaining orders are not a favored remedy. "The Board itself has recognized . . . that secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support." *NLRB* v. *Gissel Packing Co.*, 395 U.S. at 602. Because of this principle and the fact that a bargaining order has always been recognized as an extraordinary form of relief, this Court has required that there exist both a sufficient basis to support a bargaining order, *and* a sufficient basis for not conducting an election. Therefore, to insure that the Board has considered the factors cited in *Gissel*, it is essential that it articulate its rationale and provide the circuit court with something more than its bare conclusions and undefined speculation.

In this case, the decisions of the administrative law judge and Board (to issue a bargaining order) are entirely devoid of the reasoning and analysis required by *Gissel*. The administrative law judge simply recited a series of statutory violations which he concluded warranted a bargaining order (Appendix B at 174a-176a). No analysis of his estimate of the impact of these violations on the election process was proffered. Notwithstanding the adamant directive of several circuits (including the Third Circuit before this decision), the Board adopted the administrative law judge's treatment without comment. Nevertheless, the court below, sitting en banc, reversed its initial decision which had remanded this case to the Board for just such analysis. Rather, it found sufficient the litany

of unfair labor practices cited by the administrative law judge. The majority opinion stated:

> "We believe that it is sufficient for the ALJ to provide an extensive list of the factors giving rise to his recommendation that a bargaining order be issued, as was done in this case. If we were to require that the ALJ also specifically state each inference drawn from these factors, no matter how obvious it is from the opinion, we would elevate form over substance and over step the appropriate limits of judicial review of the Board's choice of remedy" Appendix A at 53a.

Thus, the court has created an alternative standard for the enforcement of bargaining orders which is contrary to the teaching of *Gissel*. The court holds that the Board need not explain why a re-run election is unlikely to reflect free choice in those cases where the Board has tallied an "extensive" list of unfair labor practices. Such a list, it is reasoned, may permit an "inescapable inference" that the election route is not feasible. The court reaches such an inference in this case. The court's "inescapable inference" is a creation which swallows up or nullifies the requirement of explication. It substitutes judicial judgment for Board judgment. The court's function is to review administrative expertise. If the Board elects not to share its expertise as to the precise issue framed by this Court, why should (how can) a reviewing court fill the void by a judgment based on inference. The concurring opinion laments the drain on the court's energies as it "anatomizes" the Board's reasons for imposing a bargaining order. If the Board performed its function properly, there would be no drain. A reviewing court should review, not act as fact finder. *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc., et al.*, 419 U.S. 281 (1974), reh.

den., 420 U.S. 956 (1975); *Hill York Corp.* v. *American International Franchises, Inc., et al.*, 448 F.2d 680 (5th Cir. 1971).

The court states that to require the administrative law judge to specifically explicate the reasons supporting his bargaining order would elevate form over substance. However, as noted by the dissent, the administrative law judge's failure to explicate evidences an omission of substance not form. It reflects the administrative law judge's failure

> ". . . to estimate the impact of the various violations and appraise 'those factors which might reasonably have a bearing on the likelihood of a fair re-run election'. The ALJ never discussed . . . why 'the possibilty of erasing the effects of past practices and of ensuring a fair election (or a fair re-run) by the use of traditional remedies, though, present, is slight . . .' . . . (the administrative law judge) failed completely to address, let only answer, the crucial inquiry whether there was a likelihood that the unfair labor practices would recur, a consideration that Gissel indicates should be taken into account." (citations omitted) (Appendix A at 78a)

Furthermore, as noted by the dissent, the absence of explication by the administrative law judge also reflects his failure to distinguish between pre- and post-majority conduct and properly consider the same (Appendix A at 78a-79a).

B. The Board has failed to disclose whether it relied upon pre-majority misconduct, thus compounding the Court's error of engaging in inference and of failing to require an articulation of the Board's reasons for imposing a bargaining order.

On the record below, findings were made that certain misconduct (discharges, interrogation, etc.) occurred before the union obtained authorization cards from a majority of the employees in the bargaining unit (Appendix B at 174a). Other misconduct occurred after majority status was established (Appendix B at 174a-175a). In fashioning the bargaining order remedy, the administrative law judge made no distinction between the two categories and presumably lumped them together (Appendix B at 175a-176a). The Board modified the administrative law judge's recommendation to the extent that it said the bargaining obligation arose as of the date majority status was achieved (Appendix B at 83a). *However, the Board failed to disclose whether it had excluded pre-majority conduct from its consideration when it adopted the administrative law judge's bargaining order remedy.* The court minimized the Board's failure to explain whether it had excluded *petitioners* pre-majority conduct because it regarded pre-majority conduct a proper consideration to a bargaining order decision *in some circumstances* (Appendix A at 47a-48a). The court did not indicate whether or why this case presented such circumstances other than to suggest that because pre-majority conduct *commenced* two weeks prior to a demand for recognition, pre-majority conduct *could* have been considered. The rationale for the court's rule and its application in this case is neither explained nor evident.

As noted above, in order to support a Category II bargaining order under *Gissel,* it first must be shown that at one point the union had a majority and that *thereafter*

employer unfair labor practices significantly undermined the union's majority strength so as to require the issuance of a bargaining order rather than the ordering of a new election. Because the union reached majority strength after the pre-majority misconduct, it may not reasonably be argued that such misconduct undermined the union's majority. And, this is not in any way altered by the fact that the pre-majority misconduct may have commenced prior to the bargaining demand. Thus, a Category II bargaining order may not rely on pre-majority misconduct.

In this case, in the absence of articulation, it must be assumed that the administrative law judge and the Board based their decision to issue a bargaining order in part upon the pre-majority conduct of petitioner. The reviewing court made this assumption because neither the Board nor the administrative law judge made any distinction between pre-majority and post-majority conduct. Nor did the court below focus on any distinction between pre-majority and post-majority conduct in reviewing the basis for the Board's conclusion to issue a bargaining order. The obvious reason again is that neither the administrative law judge nor the Board explained the basis for their conclusion. Consequently, their conclusion could not be reviewed intelligently by the circuit court nor could the circuit court properly determine whether *Gissel* standards had been applied.

A decision to issue a bargaining order which is supported in part by pre-majority conduct of an employer is at best suspect even when such decision making is explained. *Rapid Manufacturing Co.* v. *NLRB,* 612 F.2d 144 (3rd Cir. 1979). However, when the reasoning or reliance on pre-majority conduct is not even explained, but we are instead required to rely on "inescapable inferences" which are neither inescapable nor inferable, the dangers of the

court below's "inescapable inference" rationale can be plainly seen.

Because it is impossible to argue that pre-majority conduct of an employer has undermined union strength, and as it is necessary to show that the union's majority strength has been undermined in order to support issuance of a Category II bargaining order under *Gissel*, a bargaining order issued on the basis of pre-majority conduct, such as the bargaining order issued in this case, should not be enforced. This is especially true where, as in this case, there is absolutely no explanation as to what reliance was placed on the pre-majority conduct in support of the decision to issue the bargaining order.

II. The writ should be granted to end a conflict among circuits.

The decision below conflicts with decisions of the Courts of Appeals for the Fifth, Sixth and Seventh Circuits.

The Third Circuit will now enforce a *Gissel* Category II bargaining order even though the Board has failed to make findings or otherwise explain why the employer's misconduct precludes or is likely to preclude the expression of free choice through an election.[5] Stated differently, in lieu

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[5] The decision below, in addition to conflicting with decisions of the other circuits, is also at odds with other decisions of the Third Circuit. Renewed instruction is required by this Court in order to eliminate the confusion facing Third Circuit litigants as well as to end the conflict among the circuits.

A quick survey of Third Circuit decisions demonstrates the wavering standard which has been applied by that court. The Third Circuit initially enforced Board bargaining orders even in the absence of a supporting statement of findings and conclusions. See

(Footnote continued on following page)

(Footnote continued from preceding page)

e.g., NLRB v. *Juaniata Packing Co.*, 464 F.2d 153 (3rd Cir. 1972); *NLRB* v. *Colonial Knitting Corp.*, 464 F.2d 949 (3rd Cir. 1972); and *NLRB* v. *Easton Packing Co.*, 437 F.2d 811 (3rd Cir. 1971). However, with the court's decision in *NLRB* v. *Armcor Industries, Inc.* (Armcor I), 535 F.2d 239 (3rd Cir. 1976), the court refused to enforce bargaining orders absent "specific findings" and a "reasoned" analysis justifying a bargaining order under *Gissel*" 535 F.2d at 244. In order to enforce a bargaining order, the court required "detailed analysis" as to the possibility of a fair rerun election and an assessment of the effectiveness of traditional remedies. *Hedstrom Co.* v. *NLRB*, 558 F.2d 1137 (3rd Cir. 1977), cert. denied, 101 S.Ct. 1699 (1981). Conclusory statements that unfair labor practices had been "'numerous and extensive"—such as in the case sub judice—did not satisfy the explication requirements of *Gissel*, 558 F.2d at 1150. Furthermore, the court required the Board to independently engage in reasoned analysis rather than merely adopt the findings of the administrative law judge. *NLRB* v. *Craw*, 565 F.2d 1267 (3rd Cir. 1977). However, only a year later, the court moved from this position, holding that the Board did not have to independently explain the basis for a bargaining order if it specifically adopted the findings and reasoning of the administrative law judge. *Kenworth Trucks of Philadelphia, Inc.* v. *NLRB*, 580 F.2d 55, enforced on rehearing, 580 F.2d 61 (3rd Cir. 1978). See also *NLRB* v. *Daybreak Lodge Nursing and Convalescent Home, Inc.*, 585 F.2d 79 (3rd Cir. 1978); and *Frito-Lay, Inc.* v. *NLRB*, 585 F.2d 62 (3rd Cir. 1978).

In *NLRB* v. *Armcor Industries, Inc.*, 98 LRRM 2441 (1978), aff'd on rehearing, 588 F.2d 821 (3rd Cir. 1978), the court reaffirmed its rulings in *Armcor I* and *Craw* while chastising the Board for its failure to make finding and engage in analysis, as well as for doing ". . . nothing more than a subjective interpretation of the facts". 98 LRRM at 2444. In refusing to enforce the bargaining order, the court, finding support in its decision in *Hedstrom*, noted that it ". . . would not enforce a bargaining order which merely characterizes an unfair labor practice as 'extensive' and 'far reaching' " 98 LRRM at 2444.

In view of this history and the decision of the court below, it is no wonder that Third Circuit litigants are without direction (or have varied directions) as to when bargaining orders will be issued and enforced.

of that detailed analysis required under *Gissel*, the court below now will enforce a bargaining order if the employer simply has engaged in multiple unfair labor practices, apparently assuming that all such conduct interferes with the election process.

Other courts of appeals have recognized that *Gissel* requires a different set of findings by the Board before a bargaining order will be enforced. In *NLRB* v. *Rexair, Inc.*, 646 F.2d 249 (6th Cir. 1981), the Sixth Circuit refused to enforce a Board order where "[t]he ALJ simply recites his findings of the Company's improper activities and then stated that a cease and desist order could not cure these wrongs." 646 F.2d at 251. That court noted that where the Board engages in such a one-sided analysis the purposes of the Act are better served by the holding of a new election rather than enforcement of the bargaining order. Similarly, in *NLRB* v. *American Cable Systems, Inc.*, 427 F.2d 446 (5th Cir. 1970), cert. denied, 400 U.S. 957 (1970) the Fifth Circuit refused to enforce a bargaining order in which the Board's remedy was "supported" by a litany of employer conduct which recited conclusions by rote without factual explication. 427 F.2d at 449. That court noted that representation questions under the Act are far too important to be resolved by such formalistic and perfunctory treatment.

The Seventh Circuit also refuses to enforce such orders in the absence of findings and reasoned analysis by the Board. *New Alaska Development Corp.* v. *NLRB*, 441 F.2d 491 (7th Cir. 1971).

The notable common denominator appearing in these cases is that, notwithstanding the explication requirements of *Gissel* and repeated instruction by the courts of appeals that the Board support its bargaining orders with reasoned analysis of all required considerations, the Board

has shown a steadfast refusal to comply with such instruction. Other examples of Board intransigence are collected in the dissenting Opinion of Judge Garth, below, (Appendix A at 71a and 74a, n.2); and *NLRB* v. *American Cable Systems, Inc., supra* at 449. The Board's repeated refusal to follow the requirements of *Gissel* requires renewed instruction by this Court.

CONCLUSION

For all of the foregoing reasons, and based upon the record as a whole, the court is urged to grant this petition for a writ of certiorari.

November 10, 1981

Respectfully submitted,

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APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-1617

NATIONAL LABOR RELATIONS BOARD,
Petitioner

vs.

PERMANENT LABEL CORPORATION,
Respondent

Application for Enforcement
National Labor Relations Board
Board Nos. 22-CA-8027, 22-CA-8144,
22-CA-8192, and 22-RC-7335

Argued November 4, 1980

Before: SEITZ, *Chief Judge*,
HUNTER and GARTH, *Circuit Judges*

Opinion filed January 8, 1981

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Appendix A

OPINION OF THE COURT

HUNTER, *Circuit Judge*:

1. This case comes before this Court upon application of the National Labor Relations Board (the "Board"), pursuant to Section 10(e) of the National Labor Relations Act (the "Act"),[1] for enforcement of its order against Permanent Label Corporation (the "Company"). The Board, after finding that Permanent Label had committed a number of serious unfair labor practices, ordered the Company to cease and desist from its unlawful actions, to reinstate and grant backpay to employee organizers, and to recognize and bargain collectively with District 65, Distributive Workers of America (the "Union"). We affirm the Board's findings of unfair labor practices. We decline, however, to enforce all the remedies ordered by the Board. Because neither the Administrative Law Judge (the "ALJ") nor the Board made specific findings as to why the extraordinary remedy of a bargaining order should be applied in this case, *Hedstrom Co. v. NLRB*, 629 F.2d 305 (3d Cir. 1980), we elect not to enforce that part of its order. We remand this case to the Board for a statement of reasons justifying the issuance of the bargaining order.

FACTS

2. In February, 1977, the Union's organizing campaign began; it was met soon thereafter with the Company's anti-union efforts.[2] A Permanent Label employee, Bernard Daly, contacted a Union agent and began talking to his fellow employees about the advantages of or-

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1. 29 U.S.C. §160(e) (1976).

2. We base our recitation of the facts on the Administrative Law Judge's findings and the evidence presented in the Record. The Board's decision offers us very little independent information upon which to base our decision.

ganizing their plant.[3] Daly was forced, however, to cease his organizing activities when Supervisor Michael Bevilacqua informed him that he could be fired for talking about the Union while in the plant.

3. Daly resumed his organizing efforts in September, 1977, after he and employee Michael Roberts were contacted by, and met with, union organizer Tom Acosta. Together, Roberts and Daly interested other employees in joining the organizing effort. They recruited, among others, Eleanor Ott, Dorothy Saracco, and Elton DeMonteverde. By mid-October, union organizer Acosta began holding meetings at which employees signed authorization cards, paid union dues, and formed an employee union organizing committee.

4. In late October, 1977, Supervisor Bevilacqua became aware of rumors about organizing activities in the plant. Bevilacqua investigated these rumors, asking Daly if he knew anything about an attempt by the Company's employees to organize. Daly denied any knowledge of such activities.

5. Shortly thereafter, on November 1, 1977, Daly was summarily discharged by the Company for excessive absenteeism. The next day, November 2, 1977, his co-organizer, Eleanor Ott, was discharged. Neither employee had ever received a warning or disciplinary notice about the alleged problem. Two weeks later, following the incidents described below, the Company decided to commute the discharges to suspensions and reinstate Daly and Ott without backpay.

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3. Permanent Label is engaged in the business of labeling and decorating plastic containers for cosmetic, drug, and household products manufacturers. The Company has two plants in New Jersey: one in Bloomfield and the other in Clifton, where the unfair labor practices occurred. The stipulated appropriate bargaining unit involved in this case encompasses all employees at the Clifton plant, excluding office clerical employees, professional employees, managerial employees, guards, assistant supervisors and all other supervisors as defined in the Act.

6. On November 4, 1977, two days after the discharges of Daly and Ott, Company Vice-President Robert Tancredi met with the employees on each of the plant's three shifts. On each occasion he delivered a speech expressing the Company's opposition to the Union. He argued that:

> The Union would out promise [sic] the employer but guarantee nothing other than that the employees would pay monthly dues, that job security could be obtained only from the company, that unionized plants sometimes became uncompetitive and find it difficult to stay in business and that it was important for job security to maintain the current level of business, and, finally that the Company's growth in business and jobs had been accomplished heretofore without outside interference.

ALJ's Decision at 9, *reprinted in* Appendix at 9. In his meeting with the second shift employees, Tancredi permitted Roberts to read an employee petition to management, signed by approximately 30 employees, which protested the discharges of Daly and Ott as unjust. Tancredi then adjourned the meeting, stating that he would stay and talk to employees about their grievances.

7. During the course of the campaign, Production Control and Office Manager Jack Studt approached many employees individually, asking why they thought they needed a union and what problems or grievances they had about conditions in the plant. Studt told the employees that he thought that the Company could resolve the problems within one year without the Union.

8. On November 11, 1977, Union organizer Acosta, accompanied by some members of the in-plant organizing committee, met with Plant Manager Doug Contreras. Acosta presented 67 signed authorization cards and asked the Company to recognize the Union. The proposed bargaining unit included approximately 125 employees. Contreras replied that he did not recognize

the committee or the Union as the representative of the employees. The Union filed a representation petition with the Board on November 14, 1977.

9. The Company's anti-union efforts continued after the Union presented its majority support. For example, on November 18, 1977, employee Zenaida Esquilin asked employee Dorothy Saracco, a member of the employees' in-plant organizing committee, for a Union authorization card for a co-worker, Maria Garcia. Garcia signed the card. However, before she could return it to Saracco, foreman Bevilacqua confronted her and asked who had given her the card. She explained that it came from Esquilin and Saracco. Later that day, foreman Bevilacqua called Saracco into his office and told her not to pass out Union cards on Company time. He also told her that while she might talk to other employees on her break time, she could not at any time pass out Union cards or literature while on Company property.

10. More interference with the organizing efforts occurred on November 29, 1979. Supervisor Robert Sanders told off-duty employee Roberts that he would be subject to disciplinary action if he continued to distribute information leaflets to employees arriving at the plant for their work shift. Roberts, although admittedly on Company property,[4] was distributing the literature in a non-work area during his off-duty time. He ceased his distributing efforts as a result of the Company's threats of disciplinary action.

11. Later that day, Roberts, Linderoth and Ott attended a board conference with the Company's representatives. A half hour before they were to start their work shifts, Roberts called to say they would be five or ten minutes late. They were informed by Supervisor Robert Sanders, the same man who had threatened Rob-.

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4. Roberts distributed the literature outside the plant between a parking lot for employees and a building entranceway for employees.

erts with discipline for distributing literature, that the Company had instituted a policy by which employees late for their shifts could not work at all, and that all three of the employees should consider themselves suspended for the day. The Board found that Sanders was acting under Plant Manager Doug Contreras' instructions; Contreras, in turn, received his orders from Vice-President Trancredi, who was attending the board conference and knew that the three employees would not be able to check into work on time.

12. The Company not only interfered with the Union's organizing efforts, but also launched a campaign of its own. Company President Al Contreras, who normally spent little time at the Clifton plant, spoke individually with approximately 500 Clifton employees, expressing the Company's opposition to the Union. In the course of these conversations President Contreras coercively interrogated employees, solicited grievances, coerced employees to campaign against the Union, discouraged employees from wearing Union buttons, promised benefits, and threatened reprisals or other adverse consequences if the Union was elected as the employees' bargaining representative. For example, Contreras apparently offered employee Mia Mehmeti assistance for schooling and reassured employee Eleanor Ott that she was eligible for health insurance. He stated to employees Iwanicki and Linderoth that if the Union was elected he would no longer care about the Company and not work hard for it because the Union would "ruin him" - it was clearly implied that along with his downfall would go that of the Company.

13. One week before the December 30, 1977 election, the Company paid year-end bonuses to all of its employees. The Company had posted a notice on January 26, 1977 announcing that for an employee to be eligible for a 1977 year-end bonus he had to be on payroll as of December 31, 1976. This notice disappeared from the

employees' bulletin board at the end of November. The Company did not replace it with a new explanation of bonus eligibility or statement of change in Company policy. Rather, in December, just one week prior to the election, the Company paid the 1977 year-end bonus to all its employees, including those with less than one year's service.

14. Finally, on December 28, 1977, two days before the representation election, the Company engaged in one of its last anti-union efforts. Company President Al Contreras delivered a prepared speech to employees on each of the shifts. He noted that he expected the Company to grow but that the introduction of the Union into the plant would hinder that growth. He stated:

> Our largest customer, the Mennen Company, which accounts for some 40% of this plant's sales is nonunion. We are the sole decorator of Mennen packages. They have felt comfortable with our clean record of no union trouble and no strikes at Permanent Label over the past 25 years. Sometimes when a company is unionized, customers divide their business between two or more vendors with different union contract expiration dates. They do this to eliminate the possibility of being cut off by a strike. I don't want to give the impression that just because a union is in a company there will be a strike, *but* we have shown you District 65's strike record, and you have seen the emphasis on strikes in their constitution.

The ALJ found that there was no basis in fact for Contreras' predictions.

15. On December 30, 1977, the representation election was held. The Union lost by a vote of 65-54 with six challenged ballots. It filed, and we now consider, objections to the election based on alleged unfair labor practices by the Company.

Appendix A

DISCUSSION:

I.

UNFAIR LABOR PRACTICES

16. There is substantial evidence in the record[5] that Permanent Label committed a host of unfair labor practices in its attempt to block the Union's bid in the representation election.

17. First, the Company violated section 8(a)(1) of the Act[6] by unlawfully soliciting grievances from employees and responding to them with implied promises of improvements. While the mere solicitation of grievances prior to an election does not constitute an unfair labor practice *per se, NLRB v. Eagle Material Handling,*

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5. When we review the Board's findings, we do so under a limited standard of review. We must accept the Board's inferences and conclusions if they are supported by substantial evidence on the record viewed as a whole. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). "Moreover, this Court must respect the role of the NLRB as an agency 'presumably equipped or informed by experience to deal with a specialized field of knowledge . . . .'" NLRB v. Craw, 565 F.2d 1267, 1270 (3d Cir. 1977) *quoting* Universal Camera, 340 U.S. at 488. While we do not mechanically adopt the Board's and ALJ's findings, NLRB v. Payless Cashway Lumber Store of S. St. Paul, 508 F.2d 24, 28 (8th Cir. 1974), we give them great weight in deciding questions of fact and credibility. NLRB v. New York — Keansburg Long Branch Bus Co., Inc., 578 F.2d 472, 478 n.15 (3d Cir. 1978) (the final determination of credibility rests with the ALJ as long as he considers all relevant factors and sufficiently explains his resolutions). *Accord*, NLRB v. Armcor Indust. Inc., 535 F.2d 239, 241 n.3 (3d Cir. 1976); Altemose Constr. Co. v. NLRB, 514 F.2d 8, 16 (3d Cir. 1975).

6. 29 U.S.C. §§158(a)(1) (1976). Section 7 of the Act, 29 U.S.C. §157 (1976), guarantees employees "the right to self-organization, to form, join or assist labor organizations . . . for the purposes of collective bargaining or other mutual aid or protection . . . ." Section 8(a)(1) secures this guarantee by making it an unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7."

Inc., 558 F.2d 160, 164 (3d Cir. 1977); *NLRB v. Rollins Telecasting, Inc.*, 494 F.2d 80, 83 (2d Cir.), *cert. denied*, 419 U.S. 964 (1974); *Landis Tool Co. v. NLRB*, 460 F.2d 23, 25 (3d Cir.), *cert. denied*, 409 U.S. 915 (1972).

> [if] the employer's grievance solicitation is accompanied by promises of benefits contingent upon the employees' rejection of the union, such conduct constitutes an interference with the rights of employees guaranteed by section 7 of the Act. 29 U.S.C. §157 (1970), and thereby violates section 8(a)(1), 29 U.S.C. §158(a)(1) (1970).

Eagle Material, 558 F.2d at 164. *See also Landis Tool*, 460 F.2d at 24-25. The employer need not explicitly promise improvements in order to violate section 8(a)(1). This court has recognized that an implied promise of benefits accompanying the solicitation of grievances may also be impermissible. *Eagle Material*, 558 F.2d at 164; *Landis Tool Co.*, 460 F.2d at 24-25. *Accord, Rollins Telecasting*, 494 F.2d at 83-84; *NLRB v. Delight Bakery, Inc.*, 353 F.2d 344, 345 (6th Cir. 1965).

18. Company President Contreras and Vice-President Tancredi responded to the Union's campaign with speeches and personal conversations assuring that the grievances could be remedied, possibly within one year, if the Union were not elected. We conclude, therefore, that the grievance solicitation — accompanied by the implied promises of benefits — violated section 8(a)(1) of the Act.

19. The Company also violated section 8(a)(1) of the Act by promising certain employees specific benefits if they would campaign against the Union. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964). The ALJ found that Company President Contreras promised benefits to a number of employees in an effort to win them away

from the Union.[7] These promises constituted a violation of section 8(a)(1). *See, e.g., Briggs & Stratton Corp.*, 244 N.L.R.B. No. 112 (1979).

20. The Company's payment of bonuses to all employees one week before the representation election also constituted a promise and grant of benefits in violation of section 8(a)(1). The well-timed bonuses to employees who were previously told that they would not be entitled to such bonuses, stand in defiant salute as the "fist inside the velvet glove." *Exchange Parts*, 375 U.S. at 409 (1964).

21. We further agree that the Company violated section 8(a)(1) by threatening the employees with the loss of their jobs and other adverse economic consequences if they supported the Union. We acknowledge that "an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 618 (1969), but there is a thin line between making predictions about the precise effects of unionization and conveying a threat of retaliation. *Id.* Permanent Label crossed that line. President Contreras prediction to the employees, both at assemblies and in individual conversations, that unionization of the plant would possibly cost the Company its major client and result in employee lay-offs was not based on objective fact. As such, his "prediction" constituted an impermissible threat and a violation of section 8(a)(1) of the Act. *See Gissel*, 395 U.S. at 618; *NLRB v. Fort Van-*

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7. Contreras made these promises to several employees. He promised employee Mehmeti that he would see if he could aid her in financing her future education, he promised contrary to ordinary procedure to guarantee employee Ott's Blue Cross-Blue Shield Coverage, and he told employees Linderoth and Grus that the Company would grow and they along with it if the Union was not elected.

couver Plywood Co., 604 F.2d 596, 599 n.1 (9th Cir. 1979); *Chauffeurs Local 633 v. NLRB*, 509 F.2d 490, 494 (U.S. App. D.C. 1974); *NLRB v. Clapper's Mfg., Inc.*, 458 F.2d 414, 418 (3d Cir. 1972).

22. The record is riddled with additional examples of section 8(a)(1) violations. Employees were interrogated about their organizing efforts[8] *NLRB v. Armcor Industries, Inc.*, 535 F.2d at 242-43 (3d Cir. 1976); *NLRB v. Colonial Knitting Corp.*, 464 F.2d 949, 951 (3d Cir. 1972); *Landis Tool*, 460 F.2d at 25, asked to influence other employees to vote against the Union, *Triana Industries, Inc.*, 245 N.L.R.B. No. 161 (1979); *Bob Motors, Inc.*, 241 N.L.R.B. No. 200 (1979); *Montgomery Ward and Co.*, 226 N.L.R.B. 184, 201 (1977), improperly classified as "supervisors" so that they could be threatened with discharge if they participated in Union activities,[9] *Answering, Inc.*, 215 N.L.R.B. 688, 689 (1974); *Berton Kirshner, Inc.*, 209 N.L.R.B. 1081, 1082 n.2 (1974), and unlawfully interferred with in their distribution of union literature. Both the Company's overly-broad no-solicitation rule,[10] *Stoddard-Quirk Mfg.*,

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8. Foreman Bevilacqua twice questioned employee Daly about his knowledge of union activities in the plant. Employees Grus and Mehmeti were interrogated about their support for the Union: employee Iwanicki was even asked by the Company President to use his influence to persuade other employees to vote against the Union.

9. The ALJ describes in considerable detail employees Gorski, Saracco, and Linderoth status as employees and not "supervisors". *See* ALJ Decision at 33-38. Because we agree with the ALJ that these employees were not supervisors, the Company's implied threat that they must choose between the Union and their jobs constituted yet another unfair labor practice by Permanent Label.

10. The plant's rule read in relevant part:

> Employees shall not engage in solicitation or literature distribution during work time in any portion of the premises, or during non-work time, in work areas of the premises.

General Counsel's exhibit GC-5. That portion of Permanent Label's written rule which prohibited employees from engaging in union

Co., 138 N.L.R.B. 615, 616-23 (1962), and its enforcement of that rule.[11] *Heritage House of Connecticut Inc.*, 192 N.L.R.B. 1081, 1081-82 (1972), violated the employee's self-organization rights.

23. Permanent Label's anti-union campaign also included violations of section 8(a)(3) of the Act. Section 8(a)(3) states that "It shall be an unfair labor practice for an employer — by discrimination in regard to hire or tenure of employment . . . [to] discourage membership in any labor organization . . . ." Shortly after the organizing effort began, Permanent Label discharged two of the leading Union supporters, employees Daly and Ott, allegedly for "excessive absenteeism." There is substantial evidence indicating, however, that the Company's true motive for the discharges was to discourage Union activities and support. Daly and Ott had never been reprimanded for their absences prior to their discharge; in fact, they never even received a notice of the problem. On the other hand, the Company had threatened Daly with discharge if he continued his Union support. It further had knowledge of employee Ott's supporting activities. We agree with the ALJ that the employees' attendance records were but a mere pretext for their dismissal. The employees were discharged because the employer believed that they were engaging in union activity. The discharges, therefore, violated the Act. *Edgewood Nursing Center, Inc. v. NLRB*, 581 F.2d 363, 368 (3d Cir. 1978); *Eagle Material*, 558 F.2d at 169 (3d Cir. 1977). *See also Wright Line, Inc., Wright Line Division*, 250 N.L.R.B. No. 151 (1980).

NOTE 10 — *Continued*,
solicitation during non-work time in the work areas of the premises is overly broad and presumptively invalid under *Stoddard-Quirk*, 138 N.L.R.B. at 617.

11 Both employees Roberts and Sarraco were prevented from distributing literature on Company property.

24. Finally we conclude, as did the Board, that the Company violated section 8(a)(4) of the Act by suspending employees Roberts, Linderoth, and Ott for attending the Board's representation conference on behalf of the Union. The employees attended the November 29 conference on their own time. When they called Supervisor Sanders to inform him that they might be late for their shift, they were told that the Company had instituted a policy that employees who were late for their shift could not work at all, and that the three employees should consider themselves suspended for the day.

25. The ALJ found, however, a different motive for the suspensions. Company Vice-President Tancredi chose the day of the Board conference to enact his new policy. His call to the plant informed Contreras that the employees would probably not return in time and that other employees should be moved in to cover their places. Ignoring the clear opportunity he had to tell the employees who were sitting in the room with him at the Board conference that they would be suspended if they did not arrive on time for their shift, Tancredi saw to it that they would be suspended. We conclude, as did the Board, that the one day suspensions were discriminatory and retaliatory actions by the Company because of the employees attendance at, and participation in, the Board proceedings. As such, they violated section 8(a)(4) which protects employees against employer reprisals if they attend or participate in, under subpoena or voluntarily, in Board proceedings. *NLRB v. Scrivener*, 405 U.S. 117, 123-25 (1972), *rehearing denied*, 405 U.S. 1033. *See also C&W Super Markets, Inc., v. NLRB*, 581 F.2d 618, 624-25 (7th Cir. 1978); *Modulus Corporation*, 236 N.L.R.B. 967 (1968), *enf'd* 591 F.2d 1336 (3d Cir. 1979); *First National Bank*, 209 N.L.R.B. 95, 101 (1974); *enf'd* 505 F.2d 729 (3d Cir. 1974).

Appendix A

II.

REMEDIES

26. In light of these pervasive unfair labor practices, we affirm the Board's order directing the respondent to cease and desist from its unfair labor practices and to give back pay to suspended employees. We decline, however, to enforce the Board's order requiring Permanent Label to bargain collectively with the Union until we have specific findings upon which to review that order.

27. This court has repeatedly held that the Board must provide a statement of the reasons leading it to impose a bargaining order.[12] *Hedstrom Co. v. NLRB*, 629 F.2d 305, 309-11 (3d Cir. 1980) ("*Hedstrom II*"); *NLRB v. Armcor Industries, Inc.*, 535 F.2d at 245; *Hedstrom Co. v. NLRB*, 558 F.2d 1137, 1150-52 (3d Cir. 1977) ("*Hedstrom I*"); *NLRB v. Craw*, 565 F.2d 1267, 1271-72 (3d Cir. 1977). *Accord, Gissel*, 395 U.S. at 610-16. The Board must

> 'estimate the impact [of the unfair labor practices], take into account the factors in the particular case which are indicative of actual effect or which plausibly, in the light of existing knowledge, would contribute to or detract from an actual impact,' and appraise 'those factors which might reasonably have a bearing' on the likelihood of a fair rerun election.

Hedstrom II, 629 F.2d at 309, *quoting Peerless of America, Inc. v. NLRB*, 484 F.2d 1108, 1118 n.16 (7th Cir. 1973).[13] *See, e.g. Hedstrom II*, 629 F.2d at 310-11 n.4 (Board's specific findings). *See also Rapid Mfg. Co. v.*

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12. It is sufficient for the ALJ to make the specific findings if the Board expressly adopts them. Kenworth Trucks of Phil. v. NLRB, 580 F.2d 55, 60 (3d Cir. 1978).

13. Also cited in *Kenworth*, 580 F.2d at 60; *Craw*, 565 F.2d at 1271; *Armcor*, 535 F.2d at 245.

NLRB, 612 F.2d 144 (3d Cir. 1979) (distinguishing between pre and post-card majority violations).

28. The Board, in the instant case, has not done this. Rather, it relied on the ALJ's conclusory statement that "these unfair labor practices cannot be corrected by conventional remedies, including a rerun election." ALJ's Decision at 50, *reprinted in* Appendix at 50.

29. We need more. Unlike the court in *Kenworth Trucks of Philadelphia v. NLRB*, 580 F.2d 55, 62-63 (3d Cir. 1978), we do not feel equipped by such a short statement to make a fair review of the Board's order. In *Kenworth*, the court was presented with similar findings,[14] but a different case.[15] The focus of *Kenworth* was not on the specificity of the findings, but on who must make them.[16] Furthermore, the court in *Kenworth* was presented with additional facts supporting the Board's

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14. The ALJ found:

> The question as to whether a bargaining order should issue is not close. The scope and extent of Respondent's unfair labor practices in this case both before and after the election make the likelihood of a fair and free rerun election infinitesimal and require that the Union's status as representative of Respondent's employees be ascertained on the basis of its authorization cards. [Footnotes omitted.]

Kenworth, 580 F.2d 63 at n.4.

15. The panel in *Kenworth* granted the NLRB's motion for rehearing on the specific issue of whether the panel's initial decision concerning "the remedy of a bargaining order and, *in particular, the direction that the NLRB itself state the reasons for such an order*" was correct. *Kenworth*, 580 F.2d at 61 (emphasis added).

16. *Id.*

reason for ordering collective bargaining.[17] Neither is present here.

30. We do not rule out the possibility that a collective bargaining order could be appropriate in this case. We ask only for the specific findings upon which to conduct our review.[18]

31. Accordingly, we remand this case for further findings consistent with this opinion.

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17. In his decision, the ALJ described the post-election violation by the Company:

> Coercion did not end with the Union's narrow election loss, but continued with the discharge of [the main Union proponents] and the threats of discharge made to [unit employees].

Kenworth, 580 F.2d 62 at n.4.

We do not hold that the presence of post-election violations will automatically justify a bargaining order, nor that their absence will bar such a remedy. This Court must have, however, an indication, as did the Court in *Kenworth*, as to why a re-run election would not remedy the Company's violation.

18. Under *Gissel* and 29 U.S.C. §160(f) (1976), this court has the responsibility to review the Board's order. While we respect the Board's knowledge and expertise in ascertaining the need for specific remedies, *Hedstrom II*, 629 F.2d at 311-12, we still must determine whether the *Gissel* standards for issuing a bargaining order have been met. *See Gissel*, 395 U.S. at 612-16. *See also Hedstrom II*, 629 F.2d at 308-09.

For this precise reason, "this Court has required the Board to provide, 'at the very least, a statement of the reasons leading the administrative agency to impose a bargaining order.' *Kenworth Trucks of Philadelphia v. NLRB*, 580 F.2d 55, 61 (3d Cir. 1978)." *Hedstrom II*, 629 F.2d at 305.

GARTH, *Circuit Judge*, concurring:

I agree with Judge Hunter that there is substantial evidence to support the ALJ's findings of unfair labor practices. I also agree with Judge Hunter that there has been no compliance with our requirement that the Board articulate its reasons for imposing a bargaining order. Judge Hunter, having so concluded however, does not deny enforcement of the Board's order, but instead remands to the Board to explain why a bargaining order, instead of a re-run election, is necessary.

I write separately because the Board's failure to furnish this court (and indeed its failure to furnish other courts, *see, e.g., Red Oaks Nursing Home v. NLRB*, 105 LRRM 3028, 3031 (7th Cir. Oct. 22, 1980)), with an articulation of reasons which has consistently been required, is of substantial concern to me. Because of the complete failure of the Board to abide by our well-established requirement that the basis for a bargaining order must be articulated, I would prefer an outright denial of enforcement so that a new election may be expedited, rather than a remand for a time-consuming, belated justification by the Board of its determination to impose a bargaining order. Remand not only presents the possibility that this court will once again have to review this very case, *see Hedstrom Co. v. NLRB*, 629 F.2d 305 (3d Cir. 1980); *General Stencils Inc. v. NLRB*, 472 F.2d 170 (2d Cir. 1972), but of greater concern, additional delay[1] will

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1. Three years have already passed since the representation election was held. Delay in the resolution of representation cases have extended for even greater periods of time. *See*, e.g., United Dairy Farmers Coop. Assoc. v. NLRB, Nos. 79-1807, 79-1883 (3d Cir., Oct. 30, 1980) (nearly seven years).

The circumstances reflected in the *Hedstrom* case, Hedstrom Co. v. NLRB, 558 F.2d 1137 (3d Cir. 1977) (*Hedstrom I*); Hedstrom Co. v. NLRB, 629 F.2d 305 (3d Cir. 1980) (*en banc*) (*Hedstrom II*), are representative of the delay which I foresee and fear. In *Hedstrom* the representation election was held in March, 1974. The Board's initial imposition of a bargaining order resulted in a remand

now occur during which the employees of Permanent Label will be unable to exercise their franchise in the selection of their representative, if indeed they desire one.

The Supreme Court has admonished the Board that elections are the preferred way to ascertain whether a Union has majority support. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969). It has held that before the remedy of a re-run election may be bypassed, the Board must consider the extensiveness of the employer's unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. *Id.* at 614. Only when the possibility of ensuring a fair re-run election is slight, should the Board issue a bargaining order. *Id.*

We have implemented this teaching by persistently requiring that the NLRB explicate the basis for the imposition of a bargaining order. *See Kenworth Trucks v. NLRB*, 580 F.2d 55, 59-60 (3d Cir. 1978); *NLRB v. Craw*, 565 F.2d 1267, 1271-72 (3d Cir. 1977); *NLRB v. Eagle Material Handling, Inc.*, 558 F.2d 161, 166-68 (3d Cir. 1977); *Hedstrom Co. v. NLRB*, 558 F.2d 1137 (3d Cir. 1977) (*Hedstrom I*); *NLRB v. Armcor Indus., Inc.*, 535 F.2d 239 (3d Cir. 1976). This requirement aids our review of a petition for enforcement by helping to ensure that the Board has given full consideration to the preferred alternative of a re-run election. *See Armcor, supra* at 245. As Judge Hunter has pointed out (Maj. Op. at 14), and as I now repeat for emphasis, the most recent opinion of this court specifying this obligation is to be found in the *en banc* decision, *Hedstrom Co. v. NLRB*, 629 F.2d 305, 309-311 (3d Cir. 1980) (*Hedstrom II*).

NOTE 1 — (*Continued*)
by this court in July, 1977 because the Board had failed to make specific findings supporting its order. The Board subsequently set forth its articulation of reasons and it was not until August 6, 1980 six years after the election, that this court, in a 6-3 *en banc* decision, sustained the Board's bargaining order.

There our court held that the Board must provide a reasoned analysis setting forth those factors justifying the imposition of a bargaining order. The analysis need not be elaborate, but the Board must:

> 'estimate the impact [of the unfair labor practices], taking into account the factors in the particular case which are indicative of actual effect or which plausibly, in the light of existing knowledge, would contribute to or detract from an actual impact,' and appraise 'those factors which might reasonably have a bearing' on the likelihood of a fair rerun election."

Hedstrom II at 309 *quoting Peerless of America, Inc. v. NLRB*, 484 F.2d 1108, 1118 n. 16 (7th Cir. 1973). *Peerless* was also quoted in *Kenworth Trucks of Philadelphia v. NLRB*, 580 F.2d at 60, *NLRB v. Craw*, 565 F.2d at 1271, and *NLRB v. Armcor Industries, Inc.*, 535 F.2d at 245.

Hedstrom I had resulted in a remand to the Board because no such analysis, articulation or explanation had been made by the Board in justifying the imposition of a bargaining order. Thereafter, in *Hedstrom II*, the Board, complying with our directive, explained that a bargaining order was necessary and that a rerun election could not fairly be ordered. On the record of that case the Board found that:

> the total effect of the threats of closure, and the numerous other unfair labor practices against the background of the general awareness of the Fitchburg experience, was to instill in employees a strong fear of loss of employment that would continue to be operative even in the event of a second election. This fear could only have been exacerbated by the publication of the newspaper editorial.
>
> We find that "the possibility of erasing the effects of past practices and of ensuring a fair election

(or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order . . .."[11] This conclusion is not significantly affected by the reviewing court's reversal of our finding that President Ketcham violated Section 8(a)(1) by threatening to fire an employee. The reversal does not disturb any of the findings concerning the threats of plant closure, or the overall context in which those threats occurred, which form the basis for our conclusion that a bargaining order is warranted.

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11. N.L.R.B. v. Gissel Packing Co., 395 U.S. at 614-615. (Appendix *Hedstrom II* at 10a) (footnotes 10 and 12 omitted).

In further compliance with our requirements, the Board also reasoned and explained that the passage of time had not increased the prospects of a fair election:

> the effect of Respondent's threats of plant closure and its extensive unfair labor practices during the course of the campaign was to instill in employees the fear that they would lose their jobs through plant closure if the Union won the election. There is nothing to indicate that this fear has been erased during the past 3 years. To the contrary, recent events indicate that Respondent's vigorous opposition to the Union continues to result in unfair labor practices, thereby sustaining, reinforcing, or increasing the fear that the Company might still carry out its earlier threat to close operations if the Union prevails.

(Appendix 11a - 12a). Finally, the Board re-examined our reversal of the Section 8(a)(5) violation and conclud-

ed that even absent that violation, a bargaining order was necessary.

A majority of this court held that the Board's explanation satisfied our mandate of a "reasoned analysis," although it is significant that three members of this court found the explanation furnished by the Board still insufficient to justify depriving employees of their franchise rights.

When contrasted with the analysis and articulation of the Board in *Hedstrom II*, it is quite apparent that the conclusory discussion of the administrative law judge in this case is woefully deficient. Virtually the entire thrust of the ALJ's discussion here was focused *not* on why a fair re-election was impossible, but rather on the reasons which required the initial election of December 30, 1977 to be set aside. He stated:

> In sum, Respondent sought to impress upon the employees the futility of voting the Union in, and that there would be harsher dealing and reprisal if they did. The mass of violations of Section 8(a)(1), (3), and (4) of the Act were egregious unfair labor practices, which had the tendency to undermine, and undermined, the Union's majority strength in the election of December 30, 1977, and prevented the holding of a fair election.
>
> By refusing to recognize and bargain with the Union, as requested on November 11, 1977, and instead engaging in this course of unlawful conduct which undermined the Union's majority status and prevented the holding of a fair election, Respondent also violated Section 8(a)(5) of the Act, *Trading Port, Inc.*, 219 NLRB 298, 300-301 (1975).
>
> Under the circumstances of this case, the sentiment of the unit employees expressed through the Union authorization cards is a more reliable measure of their desires on the issue of representation

than the election held December 30, 1977. To remedy Respondent's unfair labor practices, including its Section 8(a)(5) refusal to bargain, a bargaining order is necessary, whether the violations be viewed as category one unfair labor practices under *Gissel, supra*, see *J.P.Stevens & Co., Inc., Gulistan Division v. N.L.R.B.*, 441 F.2d 514, 521-522 (C.A. 5, 1971), cert. denied 404 U.S. 830, or as category two unfair labor practices, see *N.L.R.B. v. Kaiser Agricultural Chemicals etc.*, 473 F.2d 374, 382-383 (C.A. 5, 1973). The bargaining order will be issued as of the end of October 1977, when Respondent embarked on its course of unlawful conduct.

After holding that the December 30, 1977 election could not be sustained, the ALJ, if he was to impose a bargaining order, was then obligated to estimate the impact of the various violations and appraise "those factors which might reasonably have a bearing on the likelihood of a fair re-run election." *Hedstrom II* at 309. This obligation however, was not satisfied. The conclusory statements appearing in the ALJ's opinion which address the issue of "bargaining order" fall far short of the *Hedstrom II* standards. All that appears by way of analysis, impact appraisal or discussion is that ". . . these [pre-election] unfair labor practices cannot be corrected by conventional remedies, including a rerun election." Moreover, the ALJ in holding that a bargaining order was necessary under *Gissel II*, did not distinguish between pre and post-card majority violations as required by *Rapid Mfg. Co. v. NLRB*, 612 F.2d 144 (3d Cir. 1979). Indeed no mention is made in his opinion with respect to the manner in which the substantial pre-card majority violations would be implicated if a rerun election was to be or-

dered. The Board in affirming the ALJ did not correct these deficiencies.[2]

I do not believe that it is incumbent upon the members of this court to point out constantly and repetitively those factors which the Board must consider before it concludes that a fair re-run election cannot be held and that a bargaining order must be imposed. The Board, not the court, has the statutory burden of determining which remedy is appropriate. 29 U.S.C. §160(c)(1976).

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2. I recognize that the "articulation" of the administrative law judge which was adopted by the Board in Kenworth Trucks v. NLRB, 580 F.2d 55 (3d Cir. 1978) could be equated in some respects to the articulation of the Board which we reject in this case. But I am satisfied that *Kenworth* does not compel the enforcement of the Board's order here. Nowhere in *Kenworth* did the Court address the sufficiency of the ALJ's explanation. Instead the *Kenworth* panel, as Judge Hunter's opinion recognizes, focused on whether the NLRB itself, as distinct from the ALJ, was required to analyze and articulate the reasons for the issuance of a bargaining order. After first holding that the NLRB had an independent obligation to formulate the reasons for issuing a bargaining order, the court on rehearing held that a separate articulation was not necessary: the Board could simply adopt the ALJ's explanation. After having decided the central issue before it, the court then proceeded to enforce the Board's order, without assessing the sufficiency of the ALJ's articulation of reasons.

On its face, the discussion implicitly accepted by the court in *Kenworth* is not dissimilar to the conclusory discussion found in this case. However, as I have pointed out, the court in *Kenworth* did not direct its attention to the adequacy of the ALJ's analysis. Thus, *Kenworth* may not be construed as holding that a conclusory analysis and conclusory articulation of reasons for the imposition of a bargaining order is all that is required. Even if *Kenworth* was construed as standing for such a proposition, the decision in *Hedstrom II* filed some two years after *Kenworth* and issuing from an *en banc* court clearly demonstrates that the type of conclusory statement found in *Kenworth* may not be relied upon to support a bargaining order.

Hence, whatever vitality may have once been attributed to such a construction of *Kenworth*, has been thoroughly undermined by *Hedstrom II*.

See Gissel at 612 n.32.[3] Certainly this court alone has furnished more than ample guidance to the Board, as to what is expected in meeting this burden.

At the least, the Board in its review of the ALJ's findings, should have considered: the closeness of the vote; the extent to which the impact of the unfair labor practices persisted in the minds of the employees and whether this impact likely would have tainted a future election; the change in the composition of the workforce; the status of the Mennen contract; the effect of the passage of time; the probability of repeated violations by Permanent Label; and the effectiveness of preferred traditional remedies. There are undoubtedly other factors and facts that the Board should have considered, but since this court has repeatedly instructed the Board in various contexts as to what constitutes a proper analysis, *see Hedstrom II* at 311-12; *Rapid Mfg. Co., supra; NLRB v. Garry Mfg. Co.*, No. 79-2113, slip op. at 25 (3d Cir. July 31, 1980) (Weis, J., dissenting); *Electrical Prods. Div. of Midland-Ross Corp. v. NLRB*, 617 F.2d 977, 990 (Weis, J., dissenting), I am loathe to once again tread the same ground. Suffice it to say:

> Routine issuance of bargaining orders after a review of the facts and a conclusory finding that the unfair labor practices were "egregious," "pervasive" or "chilling" is simply unacceptable.
>
> Bargaining orders have been defended as a necessary sanction to deter misconduct by an overreaching employer, but such orders do not affect the em-

---

3. *Cf.* Red Oaks Nursing Home v. NLRB, 105 LRRM 3028, 3031 (7th Cir. Oct. 22, 1980) ("typically, this court has reached the merits of the propriety of the order, in part to avoid further compromise of employee rights inherent in the delay of remand. . . . Thus, the effect of the Board's continuing neglect to fashion standards for the exercise of its discretion is to place exclusive reliance on judicially prescribed standards for determining the need for bargaining orders, a practice not contemplated by section 10(c) of the Act.")

> ployer alone — they also fall on employees. It is they who lose the right to vote in favor of one union or another or none at all — rights that the National Labor Relations Act guarantees to them. Moreover, the Board's remedies should right the wrong — not act as punitive measures. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 61 S.Ct. 77, 85 L.Ed. 6 (1940).
>
> In imposing bargaining orders, the Board is subordinating the employee's right to express his choice to its forecast as to who would have won the election if the employer had maintained laboratory conditions. When that prediction is little more than a guess, however, the Board's paternalism does not justify depriving the employees of their vote. The extreme response of a bargaining order should be the exception and not the norm — a principle recognized by this court in *Armcor* and *Hedstrom*.

Electric Prods. Div. of Midland-Ross v. NLRB, 617 F.2d 977, 991 (3d Cir. 1980) (Weis, J., dissenting)(footnotes omitted).

Our court is not alone in requiring the Board to explain its reasons for rejecting a re-run election in favor of imposing a bargaining order. The Seventh Circuit, whose opinion in *Peerless of America Inc. v. NLRB*, 484 F.2d 1108 (7th Cir. 1973) was relied upon by this court in *Hedstrom II*, *Craw* and *Armcor*, has again forcefully reiterated an identical instruction to the Board in *Red Oaks Nursing Home v. NLRB*, 105 LRRM 3028 (7th Cir. Oct. 22, 1980). The court in that case found the Board's reasons for imposing a bargaining order insufficient. The ALJ, in an opinion adopted by the Board, had stated:

> I do not, however, consider the unfair labor practices committed to be minor in view of their nature, number, and extent of probable impact throughout the bargaining unit. In my opinion, neither the factors recited above nor the Board's traditional reme-

> dies for Section 8(a)(1) violations render it likely that another election would result in a truer measure of uninhibited employee choice than the authorization cards executed on or before August 22, 1977. I therefore in all the circumstances of this case find that the Respondent's unfair labor practices have undermined the Union's majority and made the holding of a fair election most unlikely, and recommend that the petition in Case 25-RC-6717 be dismissed and the Respondent be ordered to bargain on request.

In denying enforcement of the Board's order, the Seventh Circuit wrote:

> the opinion of the ALJ contains no consideration of the effectiveness of the ordinary remedies, the continuing impact of the unfair labor practices on the election process, and the probability of repeated violations, which are also prerequisites for a bargaining order. *See Peerless, supra*, 484 F.2d at 1118. By not stating separately why the circumstances of this case require a bargaining order, the Board appears in effect to be automatically issuing bargaining orders on the basis of virtually any unfair labor practice, a policy clearly not in accordance with *Gissel*. *See NLRB v. Appletree Chevrolet, Inc.*, 608 F.2d 988, 998, 103 LRRM 2066 (4th Cir. 1979).

I find little difference between the Board's statement of reasons which was found wanting in *Red Oaks* and the statement of reasons given by the ALJ here. If anything the analysis and articulation of reasons in *Red Oaks* is more detailed, and even that analysis was rejected. The Seventh Circuit held in *Red Oaks* that the Board's statement there was conclusory and insufficient. I am compelled to reach the same conclusion in reviewing the ALJ's statement here.

The holding that the Board's analysis was inadequate leaves for consideration the issue of whether this court should remand to the Board as Judge Hunter would have us do, to give that body another opportunity to meet our standard, or whether we should deny enforcement outright, as I prefer, and therefore expedite the holding of a new election. I believe that a remand is the less desirable choice because it will lead to further delay, because it raises the possible need for further judicial review,[4] and particularly because the Board has been on notice through numerous opinions of this and other courts, *see, e.g., Automated Business Systems v. NLRB*, 497 F.2d 262, 275-76 (9th Cir. 1974); *Peerless of America, Inc. v. NLRB*, 484 F.2d 1108 (7th Cir. 1973); *NLRB v. World Carpets*, 463 F.2d 57, 62 & n. 6 (2d Cir. 1972), that it must analyze, appraise, and explain why a fair re-run election cannot be had. Indeed, I agree with the principle announced by the Seventh Circuit that it should be presumed "from the legal principle that elections are the preferred means for determining representative status and from the absence of express articulated consideration, that the necessary requirements for a bargaining order prescribed in *Gissel* are not present." *Red Oaks* at 3031 (footnote omitted). Nonetheless, rather than contribute to three differing dispositions,[5] with no mandate of the court, and with no direction given to the Board, I am persuaded to concur in Judge Hunter's opinion and in the disposition he proposes. I do so because I fear that any other course of action would require that an *en banc* court be convened with additional attendant delays. *See* note 1, *supra*; *Hedstrom I* and *II*.

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4. A remand may not even place this court in a better position to rule on the propriety of a bargaining order. The Seventh Circuit observed in *Red Oaks*, supra, at 3031 that "[a] remand for a statement of the Board's reasons has in the past proved futile . . .."

5. Judge Hunter would remand; Chief Judge Seitz would affirm; and as I have indicated, my preference would have been to deny enforcement outright.

Thus, albeit reluctantly, I join in Judge Hunter's direction that this case be remanded to the Board for specific findings and a statement of reasons sufficient to support its imposition of a bargaining order.

SEITZ, *Chief Judge*, dissenting:

I agree with Judges Hunter and Garth that there is substantial evidence to support the Board's findings of unfair labor practices. I also agree that the Board must furnish this court with an articulation of its basis for imposing a bargaining order. In my view, however, the Board has complied with this requirement, and I therefore would enforce the order of the Board.

It is well established that the Board must articulate the factors that justify the imposition of a bargaining order. *See, e.g., Hedstrom Co. v. NLRB*, 558 F.2d 1137 (3d Cir. 1977); *NLRB v. Armcor Industries, Inc.*, 535 F.2d 239 (3d Cir. 1976). However, if the ALJ provides a statement of reasons for his recommendation of a bargaining order, the Board need not separately articulate the reasons for imposing a bargaining order as long as it specifically adopts the findings and reasoning of the ALJ. *See Kenworth Trucks v. NLRB*, 580 F.2d 55, 62-63 (3d Cir. 1978). In this case, the Board specifically affirmed the rulings, findings, and conclusions of the ALJ, and it adopted his order as modified. Therefore, if the ALJ provided a sufficient statement of reasons for recommending that the bargaining order be issued, the order of the Board should be enforced.

The ALJ issued a fifty-three page opinion in which he detailed Permanent Label's numerous violations of sections 8(a)(1), (a)(3), (a)(4), and (a)(5). During the course of detailing the conduct that gave rise to these

violations, the ALJ described the attitude of Permanent Label. The following is representative:

> Respondent's antiunion animus was clear and unrelenting. As President Contreras stated, there had been attempts to organize the plant before this attempt, he was constantly vigilant against renewed attempts, and he had been successful in keeping the Union out. The summary of his actions in this case, together with the related actions of the other managerial and supervisory staff of Respondent, denoted a spirit and willingness to take any means deemed necessary to defeat the Union and to deprive the employees of an untrammeled choice of a bargaining representative, including unlawful means.

ALJ's Decision at 40.

The ALJ concluded that the election should be set aside. *Id.* at 47. In addition, in the next section of his opinion, he addressed "whether a rerun election would be an adequate remedy, or would appear to be a futile act that would permit Respondent to benefit by its misconduct in the pre-election period, requiring instead the remedy of a bargaining order under the principles enunciated in *NLRB v. Gissel Packing Company*." Id. at 47. The ALJ recommended that a bargaining order should issue for the following reasons:

> [U]pon becoming aware that the Union had begun organizing and was seeking representative status, Respondent engaged in a campaign designed to thwart the organizing and destroy any majority the Union may have succeeded in obtaining. Commencing about two weeks before the Union requested recognition . . . , Respondent engaged in . . . interrogation of the leading union proponent among the employees concerning organizing, then discharged him, and a coworker associated with him in organizing activity, in violation of Section

8(a)(3), and launched a countercampaign against the Union affecting all employees, starting with "captive audience" employee meetings used to convey its antiunion hostility and to sound warnings of the dire consequences of bringing in the Union. . . .

Respondent continued its countercampaign during November and December until the election of December 30, with its president interviewing every employee on the plant floor between one and five times each, followed by a final "captive audience" speech; and by its vice president, plant manager, department heads, and shift foremen engaging in discussions with employees on and off the plant floor. In the course of this barrage of campaigning against the Union, Respondent's officers and supervisors overstepped the bounds of legality many times. Employees were promised benefits and correction of solicited grievances if they would forget the Union, and threatened with no correction of grievances and loss of jobs if they brought the Union in. A substantial group of employees, not entitled to year end bonuses under Respondent's written policy, were paid a bonus along with the other employees just prior to the election. Respondent illegally interfered with the employees' self organizational rights by coercive interrogation concerning their Union interest, interference with wearing of Union insignia, interference with employee solicitation of Union memberships and distribution of Union literature by promulgation and enforcement of illegal rules, coercion to induce influential employees to induce other employees to cease Union support, threatening discharge of three leading Union supporters unless they ceased Union activities under a sham claim that they were supervisors, and disciplining three employees for attendance at a

> Board conference to assist the Union on the representation petition.
>
> In sum, Respondent sought to impress upon the employees the futility of voting the Union in, and that there would be harsher dealing and reprisal if they did. The mass of violations of Section 8(a)(1), (3), and (4) of the Act were egregious unfair labor practices, which had the tendency to undermine, and undermined, the Union's majority strength in the election . . . and prevented the holding of a fair election.
>
> . . .
>
> Under the circumstances of this case, the sentiment of the unit employees expressed through the Union authorization cards is a more reliable measure of their desires on the issue of representation. . . . To remedy Respondent's unfair labor practices . . . , a bargaining order is necessary.

ALJ's Decision at 48-49. Upon reviewing the entire opinion of the ALJ, I believe the conclusion is inescapable that the ALJ delineated these factors, not as justification for setting aside the election as Judge Garth and apparently Judge Hunter conclude, but as reasons why a rerun election "would appear to be a futile act that would permit Respondent to benefit by its misconduct in the pre-election period," *id.* at 47, thus justifying the imposition of a bargaining order. The fact that the ALJ had found that the election must be set aside in the previous section of his opinion supports this conclusion.

It is important to keep in mind that the primary purpose of requiring that the Board provide a statement of reasons leading to the imposition of a bargaining order is "to assist a reviewing court in determining whether the standards of *Gissel* have been satisfied." *Hedstrom Co. v. NLRB*, 629 F.2d 305, 309 (3d Cir. 1980) (in banc) (*Hedstrom II*). It is not to burden the Board, nor to limit the issuance of bargaining orders. *See, e.g., id.*; *Armcor*

Industries, Inc., 535 F.2d at 245. I believe that the ALJ's statement of reasons in this case is more than sufficient to allow this court to determine whether the standards of *Gissel* have been met.

In reaching the contrary conclusion, the majority gives an ungenerous reading to *Kenworth Trucks*. It is true, as the majority asserts, that the *Kenworth Trucks* panel focused on whether the Board must separately articulate the reasons for imposing a bargaining order. However, to enforce the order of the Board, the panel necessarily decided that the statement of reasons given in that case was sufficient. For different panels of the same court to enforce the bargaining order in *Kenworth Trucks* and to deny enforcement in this case, in which the statement of reasons was at least as extensive as that in *Kenworth Trucks*, leads to the inconsistency and unpredictability that the requirement of a statement of reasons for imposing a bargaining order was intended to prevent. *See, e.g., Armcor Industries*, 535 F.2d at 245.

This is not a case in which the ALJ merely stated conclusorily that the bargaining order should issue. Instead, he demonstrated that the violations were widespread, thus indicating Permanent Label's proclivity to exceed the limits of the law in its attempt to prevent unionization, and he stated that high-level officers, including the president and vice president, had threatened reprisals, coercively interrogated employees, and illegally promised benefits. Moreover, he demonstrated that every employee on the floor not only was interviewed individually by the president but also was subjected to "captive audience"speeches. Therefore, he found that a bargaining order was necessary to remedy these extensive unfair labor practices. It is inconceivable to me that this court should deny enforcement merely because the ALJ failed to write down the inescapable inference he made in recommending that a bargaining order issue, *i.e.* that merely ordering Permanent Label to refrain from future violations would not erase the effects of

these threats and other egregious violations from the employees' memories, and thus that the possibility of a fair rerun election was slight.

I believe that it is sufficient for the ALJ to provide an extensive list of the factors giving rise to his recommendation that a bargaining order be issued, as was done in this case. By requiring that he also specifically state each inference he has drawn from these factors, no matter how obvious it is from his opinion, a reviewing court elevates form over substance and oversteps the appropriate limits of judicial review of the Board's choice of remedy. Therefore, I would enforce the order of the Board.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Appendix A

Order for Rehearing [Corrected Copy]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-1617

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

PERMANENT LABEL CORPORATION,
Respondent

Board Nos. 22-CA-8027, 22-CA-8144,
22-CA-8192, and 22-RC-7335

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

ORDER

A majority of the active judges having voted for rehearing in banc in the above captioned case, it is

ORDERED that the Clerk of this Court list the above captioned case for rehearing before the Court in banc at the convenience of the Court, and it is

FURTHER ORDERED that the opinion filed January 8, 1981 and the judgment entered February 11, 1981, be, and are hereby vacated.

BY THE COURT,

/s/ SEITZ

Chief Judge

DATED: March 4, 1981

Appendix A

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Appendix A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-1617

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

PERMANENT LABEL CORPORATION,
Respondent

APPLICATION FOR ENFORCEMENT
NATIONAL LABOR RELATIONS BOARD
BOARD NOS. 22-CA-8027, 22-CA-8144,
22-CA-8192, and 22-RC-7335

Argued November 4, 1980

Before: SEITZ, *Chief Judge*,
HUNTER and GARTH, *Circuit Judges*

Reargued in banc May 11, 1981

Before: SEITZ, *Chief Judge*,
ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS,
GARTH, HIGGINBOTHAM, and SLOVITER, *Circuit Judges*

(Filed June 30, 1981)

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John E. Higgins, Jr., Dep.
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Frank X. McDermott, Esq. (Argued)
Francis A. Mastro
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Attorneys for Respondent

OPINION OF THE COURT

SEITZ, *Chief Judge*.

The National Labor Relations Board (Board) petitions for enforcement of its order against Permanent Label Corporation (Company). To remedy the many unfair labor practices that the Board found the Company had committed, the Board ordered the Company to cease and desist from certain unlawful actions, to reinstate and grant backpay to certain employees, and to recognize and bargain collectively with the Distributive Workers of America, District 65 (Union). The Company resists enforcement on the ground that the various findings of unfair labor practices made by the Board, and the remedies ordered by the Board, are not supported by substantial evidence on the record as a whole.

Appendix A

I.

Our factual narration is based on the findings of the Administrative Law Judge (ALJ), which were adopted by the Board. In February 1977, a Company employee, Bernard Daly, contacted a Union agent and began talking to his fellow employees about the advantages of organizing their plant. Daly ceased his organizing activities when Supervisor Michael Bevilacqua informed him that he could be fired for talking about the Union while in the plant.

Daly resumed his organizing efforts in September 1977, after he and employee Michael Roberts were contacted by, and met with, Union organizer Tom Acosta. Together, Roberts and Daly interested other employees in joining the organizing effort. They recruited, among others, Eleanor Ott, Dorothy Saracco, and Elton DeMonteverde. By mid-October, Union organizer Acosta began holding meetings at which employees signed authorization cards, paid Union dues, and formed a Union organizing committee.

In late October 1977, Supervisor Bevilacqua became aware of rumors of organizing activities in the plant. He investigated these rumors, asking Daly if he knew anything about an attempt by the Company's employees to organize. Daly denied any knowledge of such activity.

On November 1, 1977, Daly was summarily discharged by the Company, allegedly for excessive absenteeism. The next day Ott was discharged, allegedly for the same reason. Neither employee had ever received a warning or disciplinary notice concerning excessive absenteeism.

Two days after the discharges of Daly and Ott, Company Vice-President Robert Tancredi met with employees on each of the plant's three shifts and delivered a speech expressing the Company's opposition to the Union. In this speech, Tancredi told employees that the

Union could promise them more than the employer, but could only guarantee that they would pay monthly dues; that only the Company could guarantee job security; that it was important for job security to maintain the current level of business; that unionized plants sometimes became uncompetitive and found it difficult to stay in business; and that thus far the Company's success had been accomplished without outside interference.

In the meeting with second-shift employees, Tancredi permitted Roberts to read a petition directed to management that had been signed by approximately thirty employees. This petition asserted that the discharges of Daly and Ott were unjust, and that both should be rehired. Tancredi accepted the petition from Roberts and said he would consider it and return with an answer. Tancredi then adjourned the meeting, stating that he would stay and talk to employees about their grievances.

On November 9, the Union filed a complaint with the Board, and served a copy on the Company. This complaint asserted that the allegedly unlawful discharges of Daly and Ott constituted unfair labor practices. On November 15, Daly and Ott accepted the Company's offer of reinstatement, but the Company treated their two-week absence as justified suspension and offered them no back pay.

During the course of the organizing campaign, Production Control and Office Manager Jack Studt approached many employees individually, asking why they thought they needed a union and what problems or grievances they had about conditions in the plant. Studt told the employees that he thought the Company could resolve the problems within one year without the Union.

On November 11, 1977, Union organizer Acosta, accompanied by some members of the in-plant organizing committee, met with Plant Manager Doug Contreras. Acosta presented sixty-seven signed authorization cards and asked the Company to recognize the

Union. The proposed bargaining unit included approximately 125 employees. Contreras replied that he did not recognize either the organizing committee or the Union as the representative of the employees. The Union filed a representation petition with the Board on November 14, 1977.

The Company's antiunion efforts continued after the Union had presented the authorization cards as evidence of its majority support. For example, on November 18, 1977, employee Zenaida Esquilin asked Saracco, who was a member of the employees' in-plant organizing committee, for a Union authorization card for a coworker, Maria Garcia. Garcia signed the card. However, before she could return it to Saracco, foreman Bevilacqua confronted her and asked who had given her the card. She explained that it came from Esquilin and Saracco. Later that day, foreman Bevilacqua called Saracco into his office and told her not to pass out Union cards on Company time. He also told her that while she might talk to other employees on her break time, she could not at any time pass out Union cards or literature while on Company property.

On November 29, 1977, Roberts stationed himself at an employee entranceway near an employee parking lot in order to distribute information leaflets to employees arriving at the plant for their work shifts. Supervisor Robert Sanders told Roberts that he would be subject to disciplinary action if he continued to distribute the information leaflets. Although Roberts was stationed on Company property, he distributed the literature only in a nonwork area during his off-duty time. As a result of the Company's threat of disciplinary action, Roberts ceased distributing materials.

Later that day, Roberts, Linderoth and Ott attended a Board conference with Company representatives. One half hour before they were to start their work shifts, Roberts called the plant to say they would be five or ten minutes late for work. On the phone, Supervisor Sanders,

who earlier had threatened Roberts with discipline for distributing literature, told Roberts that the Company had instituted a policy that foreclosed employees who were late for a shift from working during that shift. Consequently, Sanders informed Roberts that all three employees should consider themselves suspended for the day. Sanders was acting under Plant Manager Contreras' instructions; Contreras, in turn, received his orders from Vice-President Tancredi, who was attending the Board conference and had called and told Contreras that the three employees would not be able to check into work on time.

During this period Company President Al Contreras, who normally spent little time at the Clifton plant, spoke individually with approximately 500 Clifton employees, expressing the Company's opposition to the Union. In the course of these conversations President Contreras coercively interrogated employees, solicited grievances, coerced employees to campaign against the Union, discouraged employees from wearing Union buttons, promised benefits, and threatened reprisals or other adverse consequences if the Union was elected as the employees' bargaining representative. For example, Contreras apparently offered employee Mia Mehmeti assistance for schooling and reassured Ott that she was eligible for health insurance. He stated to employees Iwanicki and Linderoth that if the Union was elected he would no longer care about the Company and not work hard for it because the Union would "ruin him" — it was clearly implied that along with his downfall would go that of the Company.

In the week of December 6, Plant Manager Contreras summoned Linderoth, Saracco, and Alice Gorski to his office. Vice-President Tancredi testified that he was aware of this meeting and its purpose. Some department and shift supervisors were present. The three employees were advised that they were considered to be supervisors; therefore, it was unlawful for them to

engage in Union activity. Further, they were informed that the Company had the right to take action against them if they engaged in Union activity. The employees testified that they left this meeting with the understanding that each was in jeopardy of being fired if he or she had anything more to do with the Union. The three employees had never been advised that they were supervisors, and they did not consider themselves, nor did their fellow employees consider them, to be supervisors.

One week before the December 30, 1977 election, the Company paid year-end bonuses to all of its employees. In January 1977, the Company had posted a notice on the employee bulletin board announcing that to be eligible for a 1977 year-end bonus an employee had to have been on the Company payroll on December 31, 1976. This notice was removed at the end of November. The Company did not replace it with a new explanation of bonus eligibility or a statement of change in Company policy. Instead, one week prior to the election, the Company paid the 1977 year-end bonus to all its employees, including those with less than one year service.

Finally, on December 28, 1977, two days before the representation election, President Contreras delivered a prepared speech to employees on each of the shifts. He noted that he expected the Company to grow but that the introduction of the Union into the plant would hinder that growth. He stated:

> Our largest customer, the Mennen Company, which accounts for some 40% of this plant's sales is nonunion. We are the sole decorator of Mennen packages. They have felt comfortable with our clean record of no union trouble and no strikes at Permanent Label over the past 25 years. Sometimes when a company is unionized, customers divide their business between two or more vendors with different union contract expiration dates. They do this to eliminate the possibility of being cut off by a strike. I

> don't want to give the impression that just because a union is in a company there will be a strike, *but* we have shown you District 65's strike record, and you have seen the emphasis on strikes in their constitution.

The ALJ found that there was no basis in fact for Contreras' predictions.

On December 30, 1977, the representation election was held. The Union lost by a vote of sixty-five to sixty-four, with six challenged ballots. The filing of these unfair labor charges followed.

II.

The Board adopted the conclusion of the ALJ that the Company had committed several unfair labor practices during the preelection period. The Board also adopted the recommendation of the ALJ that a bargaining order was necessary to remedy the unfair labor practices, but it modified the ALJ's bargaining order to run from November 11, 1977, the date on which the Union presented the Company with authorization cards signed by a majority of the employees and demanded recognition. The Company urges that we find that neither the findings of unfair labor practices nor the conclusion that a bargaining order was a necessary remedy are supported by substantial evidence on the record as a whole. The Board adopted the following conclusions of law:

> 1. In October — December 1977, by soliciting grievances and promising benefits and correction of grievances if the employees would forget the Union, and by threatening no correction of grievances and loss of jobs if they brought the Union in; by granting bonus benefits, just prior to the election; by coercive interrogation of employees concerning organizing, who supplied Union cards, and employee interest in the Union; by interfering with the employees wearing Union insignia; by promulgating

and enforcing rules prohibiting solicitation by employees of Union memberships in plant work areas on nonwork time, and distribution of Union literature by employees in nonwork areas during nonwork time; by coercion to induce or attempt to induce influential employees to induce other employees to cease Union support; and by instructing nonsupervisory employees, under threat of discipline, to cease support of the Union, Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

2. By discharging employees Bernard Daly and Eleanor Ott on November 2, 1977, because of their Union activity and to discourage employees interest and membership in the Union, Respondent engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act. The change of their discharge, on November 16, 1977, to suspension without pay for the prior two weeks, reduced the severity of the discriminatory action but continued the violation of Section 8(a)(3) and (1) of the Act.

3. By suspending for one day without pay, on November 29, 1977, employees Michael Roberts, Robert Linderoth, and Eleanor Ott, because they attended a Board conference to assist the Union with the representation petition, Respondent engaged in unfair labor practices in violation of Section 8(a)(4) of the Act.

4. By refusing to recognize and bargain with the Union as representative of a majority of the employees as requested on November 11, 1977, but instead engaging, from the end of October to the end of December 1977, in commission of the unfair labor practices enumerated in paragraphs 1, 2 and 3 above, Respondent undermined the majority in the unit of employees that the Union represented, and made impossible the holding of a fair representation election. Respondent's refusal to bargain and em-

barking upon this course of misconduct constituted an unfair labor practice in violation of Section 8(a)(5) of the Act.

* * *

6. Respondent's pre-election unfair labor practices nullified the results of the December 30, 1977 representation election, and these unfair labor practices cannot be corrected by conventional remedies, including a rerun election. Accordingly, it is appropriate and necessary that Respondent be ordered to bargain with the Union . . . .

A.

Before we reach the question whether the bargaining order should be enforced, we address the contention of the Company that the findings that it committed several unfair labor practices under the National Labor Relations Act, 29 U.S.C. §158 (1976) (Act), are not supported by substantial evidence on the record as a whole. First, the Company argues that the finding that it engaged in unfair labor practices in violation of section 8(a)(1) of the Act lacks sufficient evidentiary support. We have reviewed the record evidence, and we have no hesitancy in finding that it forms more than a sufficient legal basis for the Board's conclusion. The Company apparently bases primary reliance on its contention that some of the ALJ's credibility findings were improper. Given the strong deference that we accord to credibility findings of the ALJ, we cannot say that they lack substantial record support. In any event, the totality of the record fully supports the ALJ's ultimate conclusions, even assuming infirmity in some of the few credibility findings challenged. Therefore, we conclude that the Company clearly overstepped the bounds of legality and violated section 8(a)(1) many times during the organization campaign.

Second, we consider the Board's determination that the Daly and Ott discharges, later converted to suspensions, were unfair labor practices under section 8(a)(3) and (a)(1) of the Act. The Company's basic contention seems to be that it was not aware of the Union organization effort at the time of the discharges; therefore, such discharges could not properly be attributable to antiunion animus.

We have reviewed the entire record and we believe that the evidence amply supports the conclusion that these initial discharges constituted unfair labor practices. When the reasons given by the Company for the discharges are viewed in light of the circumstances surrounding the discharges, we believe that the ALJ and the Board were justified in finding these reasons to be mere pretexts. We conclude that the finding that the discharges of Daly and Ott violated section 8(a)(3) and (a)(1) of the Act is amply supported by the record.

Third, the Company challenges the Board's finding that the one-day suspensions of Roberts, Linderoth and Ott, when their attendance at a Board conference caused them to be ten minutes late for their work shifts, were unfair labor practices in violation of section 8(a)(4). We believe that the record as a whole more than warrants the conclusion reached by the Board that the suspensions were retaliatory actions because of the employees' assistance to the Union. Therefore, these suspensions violated section 8(a)(4).

Finally, the Board adopted the conclusion of the ALJ that the Company's numerous unfair labor practices interfered with the free choice of the Company's employees, and therefore destroyed the "laboratory conditions" desirable for the conduct of a Board election. As a result, the Board concluded that the election of December 30, 1977 must be set aside. We think that the record findings, which we have found sufficient to support the findings of numerous violations of the Act, clearly support this determination.

B.

The Company contends that there is not substantial evidence to support the Board's conclusion that a bargaining order should issue because the Company violated section 8(a)(5) of the Act by refusing to recognize and bargain with the Union as requested on November 11, 1977, and instead engaging in the unfair labor practices detailed above, which both undermined the Union's majority status and prevented the holding of a fair election. As our previous discussion has demonstrated, substantial evidence on the record as a whole supports the plethora of unfair labor practices found. However, it is established, at least in this circuit, that when the Board imposes a bargaining order, it must articulate the factors that justify the choice of this remedy over the ordering of a new election. *See, e.g., Hedstrom Co. v. NLRB*, 558 F.2d 1137 (3d Cir. 1977); *NLRB v. Armcor Industries, Inc.*, 535 F.2d 239 (3d Cir. 196). If the ALJ provides a statement of reasons for recommending that the Board impose a bargaining order, the Board need only specifically adopt the findings and reasoning of the ALJ. A separate articulation by the Board of the reasons for imposing a bargaining order is unnecessary. *See Kenworth Trucks v. NLRB*, 580 F.2d 55, 62-63 (3d Cir. 1978).

Nevertheless, the Company argues that the Board should have provided a statement of reasons justifying the imposition of a bargaining order independent of that provided by the ALJ because it modified the ALJ's bargaining order to run from the date of the Union's demand for recognition based on its card majority and not the date of the first unfair labor practice.[1] In making this

1. The Company's argument is based on the assumption that by modifying the date of the bargaining order, the Board implicitly indicated that the Company's unfair labor practices were not sufficiently egregious to support a *Gissel* I bargaining order. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). In his opinion, the ALJ distinguished the "outrageous and pervasive" practices that fall

argument, the Company relies on *Rapid Manufacturing Co. v. NLRB*, 612 F.2d 144 (3d Cir. 1979). According to the Company, *Rapid Manufacturing Co.* prohibits the Board from supporting a *Gissel* II bargaining order by relying on conduct that occurred before the Union demanded recognition. We do not read *Rapid Manufacturing Co.* this broadly. Obtaining a majority of Union authorization cards is a continuing process, and the length of time it takes to achieve a majority varies from plant to plant, often depending on the number of employees involved. We believe that in some circumstances the Board may properly consider unlawful conduct that occurred before the Union demanded recognition in determining whether the employer's course of unlawful conduct was sufficiently pervasive to undermine the Union's majority support and to make the possibility of a fair rerun election slight, and thus to support the imposition of a *Gissel* II bargaining order. Forbidding the Board from considering such conduct sets an artificial time barrier and ignores the possible cumulative effect of antiunion activity.

In this case, the course of unlawful conduct commenced approximately two weeks before the Union demanded recognition. The Union had already obtained a significant number of authorization cards. Therefore, we do not believe that the Board is precluded from relying on the statement of reasons for imposing a bargaining order provided by the ALJ merely because he relied on both premajority and postmajority conduct.

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within the *Gissel* I category and justify the imposition of a bargaining order without regard to majority status from the "less pervasive" practices that comprise the *Gissel* II category, and he stated that he believed that a bargaining order was appropriate under either category. For a discussion of the distinction between *Gissel* I and *Gissel* II categories, see *Rapid Mfg. Co. v. NLRB*, 612 F.2d 144, 148 (3d Cir. 1979). We will assume for purposes of this appeal that the Board's modification of the date of the bargaining order was based on the reason asserted by the Company.

Appendix A

The Board specifically affirmed the rulings, findings, and conclusions of the ALJ, and adopted his order as modified. Therefore, if the ALJ provided a sufficient statement of reasons for recommending that the bargaining order be issued, the order of the Board should be enforced.

The ALJ issued a fifty-three page opinion in which he detailed the Company's numerous violations of section 8(a)(1), (a)(3), (a)(4), and (a)(5). While detailing the course of conduct that gave rise to these violations, the ALJ described the attitude of the Company. The following characterization is representative:

> Respondent's antiunion animus was clear and unrelenting. As President Contreras stated, there had been attempts to organize the plant before this attempt, he was constantly vigilant against renewed attempts, and he had been successful in keeping the Union out. The summary of his actions in this case, together with the related actions of the other managerial and supervisory staff of Respondent, denoted a spirit and willingness to take any means deemed necessary to defeat the Union and to deprive the employees of an untrammeled choice of a bargaining representative, including unlawful means.

In one section of his opinion, the ALJ concluded that the election must be set aside. In the next section, the ALJ addressed "whether a rerun election would be an adequate remedy, or would appear to be a futile act that would permit Respondent to benefit by its misconduct in the pre-election period, requiring instead the remedy of a bargaining order under the principles enunciated in *NLRB v. Gissel Packing Company*, 395 U.S. 575 (1969)." The ALJ recommended that a bargaining order should issue for the following reasons:

> [U]pon becoming aware that the Union had begun organizing and was seeking representative status,

Appendix A

Respondent engaged in a campaign designed to thwart the organizing and destroy any majority the Union may have succeeded in obtaining. Commencing about two weeks before the Union requested recognition . . . , Respondent engaged in . . . interrogation of the leading union proponent among the employees concerning organizing, then discharged him, and a coworker associated with him in organizing activity, in violation of Section 8(a)(3), and launched a countercampaign against the Union affecting all employees, starting with "captive audience" employee meetings used to convey its antiunion hostility and to sound warnings of the dire consequences of bringing in the Union. . . .

Respondent continued its countercampaign during November and December until the election of December 30, with its president interviewing every employee on the plant floor between one and five times each, followed by a final "captive audience" speech; and by its vice president, plant manager, department heads, and shift foremen engaging in discussions with employees on and off the plant floor. In the course of this barrage of campaigning against the Union, Respondent's officers and supervisors overstepped the bounds of legality many times. Employees were promised benefits and correction of solicited grievances if they would forget the Union, and threatened with no correction of grievances and loss of jobs if they brought the Union in. A substantial group of employees, not entitled to year end bonuses under Respondent's written policy, were paid a bonus along with the other employees just prior to the election. Respondent illegally interfered with the employees' self organizational rights by coercive interrogation concerning their Union interest, interference with wearing of Union insignia, interference with employee solicita-

tion of Union memberships and distribution of Union literature by promulgation and enforcement of illegal rules, coercion to induce influential employees to induce other employees to cease Union support, threatening discharge of three leading Union supporters unless they ceased Union activities under a sham claim that they were supervisors, and disciplining three employees for attendance at a Board conference to assist the Union on the representation petition.

In sum, Respondent sought to impress upon the employees the futility of voting the Union in, and that there would be harsher dealing and reprisal if they did. The mass of violations of Section 8(a)(1), (3), and (4) of the Act were egregious unfair labor practices, which had the tendency to undermine, and undermined, the Union's majority strength in the election . . . and prevented the holding of a fair election.

* * *

Under the circumstances of this case, the sentiment of the unit employees expressed through the Union authorization cards is a more reliable measure of their desires on the issue of representation. . . . To remedy Respondent's unfair labor practices . . . , a bargaining order is necessary.

Upon reviewing the entire opinion of the ALJ, we believe the conclusion is inescapable that the ALJ delineated these factors, not merely as justification for setting aside the election, but as reasons why a rerun election "would appear to be a futile act that would permit Respondent to benefit by its misconduct in the pre-election period," thus justifying the imposition of a bargaining order. The fact that the ALJ had found that the election must be set aside in the previous section of his opinion supports this conclusion.

Appendix A

The primary purpose of requiring that the Board provide a statement of reasons leading to the imposition of a bargaining order is "to assist a reviewing court in determining whether the standards of *Gissel* have been satisfied." *Hedstrom Co. v. NLRB*, 629 F.2d 305, 309 (3d Cir. 1980) (in banc) (*Hedstrom II*). Moreover, requiring a statement of reasons is intended to add predictability and stability to this important area of labor law. This requirement is not intended to burden the Board, nor to limit the issuance of bargaining orders. *See, e.g., id.*; *Armcor Industries, Inc.*, 535 F.2d at 245.[2] We believe that the ALJ's statement of reasons in this case is more than sufficient to allow this court to determine whether the standards of *Gissel* have been met.

In this case the ALJ did not merely state conclusorily that the bargaining order should issue. Instead, he demonstrated that the violations were widespread, thus indicating the Company's proclivity to exceed the limits of the law in its attempt to prevent unionization. He also explained that high-level officers, including the president and vice president, had threatened reprisals, coercively interrogated employees, and illegally promised benefits. Moreover, he demonstrated that each employee in the plant was not only interviewed individually by the president but was also subjected to "captive audience" speeches. Therefore, he found that a

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2. We note that in *Kenworth Trucks*, 580 F.2d 55, a panel of this court found a similar statement of reasons sufficient to enforce a bargaining order. Although it is true that the *Kenworth Trucks* panel focused on whether the Board must separately articulate the reasons for imposing a bargaining order, it necessarily decided that the statement of reasons given in that case was sufficiently detailed to enforce the Board's order. For this court to enforce the bargaining order in *Kenworth Trucks* and to deny enforcement in this case would lead to the very inconsistency and unpredictability that requiring a statement of reasons justifying the imposition of a bargaining order was intended to prevent. *See, e.g., Armcor Indus., Inc.*, 535 F.2d at 245.

bargaining order was necessary to remedy these extensive unfair labor practices. We do not believe enforcement should be denied merely because the ALJ did not write down the inescapable inference he made in recommending that a bargaining order issue—that merely ordering the Company to refrain from future violations would not erase the effects of these threats and other egregious violations from the employees' memories, and thus that the possibility of a fair rerun election was slight.

We believe that it is sufficient for the ALJ to provide an extensive list of the factors giving rise to his recommendation that a bargaining order be issued, as was done in this case. If we were to require that the ALJ also specifically state each inference drawn from these factors, no matter how obvious it is from the opinion, we would elevate form over substance and overstep the appropriate limits of judicial review of the Board's choice of remedy. Finally, the conclusion of the Board that a bargaining order is necessary to remedy the substantial unfair labor practices committed by the Company is supported by substantial evidence on the record as a whole, and is consistent with *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

III.

The order of the Board will be enforced.

ALDISERT, *Circuit Judge*, concurring.

Although I concur in the result reached by the majority, I take advantage of this in banc opportunity to set forth my dissatisfaction with the rule both the majority and dissenting opinions apply. The rule fabricated by this court on previous occasions provides that when the NLRB proposes a Gissel bargaining order, it must articulate in detail the factors that justify its choice of this remedy rather than ordering a new election.[1] *See Hedstrom Co. v. NLRB*, 629 F.2d 305 (3d Cir. 1980) (in banc) (*Hedstrom II*), *cert. denied*, 49 U.S.L.W. 3710 (1981); *Hedstrom Co. v. NLRB*, 558 F.2d 1137 (3d Cir. 1977) (*Hedstrom I*); *NLRB v. Armcor Industries, Inc.*, 535 F.2d 239 (3d Cir. 1976). In my view, this procedural rule was promulgated without authority and rests on certain unwarranted assumptions about the factfinding competence of Administrative Law Judges never openly articulated in the opinions supporting the *Armcor-Hedstrom* rule. Moreover, our decisions indicate that rather than applying the rule in a neutral fashion, the panels of this court have manipulated it primarily to achieve the results a given panel majority desires.[2]

The rule has experienced a battered history in this court. The issue of what the ALJ and NLRB must find and say to impose a bargaining order has required three

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1. The Board may satisfy this requirement by specifically adopting the ALJ's findings and reasoning without separate analysis. *See Kenworth Trucks v. NLRB*, 580 F.2d 55, 62-63 (3d Cir. 1978).

2. Although I refer to the precept applied in this case as a rule, it fails to meet the criteria to deserve the name. Strictly speaking, a rule is a "precept attaching a definite, detailed legal consequence to a definite, detailed set of facts." Pound, *Hierarchy of Sources and Forms in Different Systems of Law* 7 Tul. L. Rev. 475, 482 (1933). *See United States v. Criden*, 633 F.2d 346, 354 n.4 (3d Cir. 1980), *cert. denied*, ____ U.S. ____, 49 U.S.L.W. 3531 (1981). The hallmark of a rule is its predictable application. As discussed below, application of this rule yields anything but predictable results.

in banc sittings, *NLRB v. Armcor Industries, Inc.*, No. 77-1495 (November 15, 1978) (*Armcor II*) (unreported per curiam),[3] *Hedstrom II*, and the present case, and a number of panel opinions, *e.g.*, *NLRB v. K&K Gourmet Meats, Inc.*, 640 F.2d 460 (3d Cir. 1981); *Electrical Products Division of Midland Ross Corp. v. NLRB*, 617 F.2d 977 (3d Cir.), *cert. denied*, ____ U.S. ____, 49 U.S.L.W. 3249 (1980); *NLRB v. Garry Mfg. Co.*, 630 F.2d 934 (3d Cir. 1980); *Rapid Mfg. Co. v. NLRB*, 612 F.2d 144 (3d Cir. 1979). I joined the majority in *Hedstrom* II with the hope that the rule could be applied evenhandedly and because I felt that its purpose could be considered salutary: "to assist a reviewing court in determining whether the standards of *Gissel* have been satisfied." *Hedstrom II*, 629 F.2d at 309. The rule, I thought, was intended to add predictability and stability to an important area of labor law.[4] *See* majority op., typescript at 14. That the present case should be before us in banc so quickly after *Hedstrom II* eloquently attests to the utter failure of the rule to achieve its goal. We are in banc because the original panel disgorged three separate views on how to decide what I consider to be a very pedestrian case.

I.

In my view, this court's first error is its wrongful assumption of authority to promulgate an essentially pro-

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3. Denying enforcement of a *Gissel* order by an equally divided court.

4. I joined the court's opinion in *Hedstrom II*, but I am now convinced that the full court erred in not administering the last rites to the *Armcor* innovation when we had the chance to do so then. In changing my view, I am mindful that "[w]isdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee v. Union Planters National Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting). *See also* R. Aldisert, The Judicial Process 861 (1976).

cedural rule for the NLRB. This is not the only occasion when this court has ventured into rule-writing escapades for a federal administrative agency. We began these independent intellectual frolics when we imposed ourselves as a special procedural rules committee for the Social Security Administration. *See, e.g., Hargenrader v. Califano*, 575 F.2d 434 (3d Cir. 1978) (requirement in Social Security disability claim that hearing officer articulate "a statement of subordinate factual foundations on which ultimate factual conclusions [sic] are based"[5]); *Baerga v. Richardson*, 500 F.2d 309 (3d Cir. 1974) (dicta), *cert. denied*, 420 U.S. 931 (1975). Although such a requirement may be "helpful in the joint work of the administrative agency and the courts," *Baerga*, 500 F.2d at 313, this observation alone cannot justify our intrusion into the procedures of a coordinate branch. This is not a federal common law area, nor an exercise of supervisory authority over courts inferior in the hierarchy. We must therefore look to Congress for any authority because, as I maintained in *Hargenrader*, 575 F.2d at 438-39 (dissenting opinion), federal courts of appeals were not given general supervisory powers over agencies of the executive branch. *See also Cotter v. Harris*, 642 F.2d 700, 708 (3d Cir. 1981) (Garth, J. dissenting). I found no Congressional authority in the Social Security cases; I find none here.

The judiciary's relationship to the NLRB is defined by 29 U.S.C. §160(e) & (f). We are instructed that "findings of fact if supported by substantial evidence on the record considered as a whole shall be conclusive," 29 U.S.C. §160(e). Congress has given little additional guidance for reviewing Board orders. When put to the task of defining the courts of appeals' scope of review of

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5. I attempted recently to clarify this impenetrable formulation of a standard. *See Smith v. Harris*, 644 F.2d 985, 990 (3d Cir. 1981) (concurring opinion).

the NLRB's remedial orders, the Supreme Court has stressed our limitations:

> A statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application. There is an area plainly covered by the language of the Act and an area no less plainly without it. But in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review. Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.

Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941). The Board's remedial orders may not be set aside "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the act." *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943).

Contrary to the position of this court, review of a *Gissel* bargaining order has been dealt with no differently:

> It is for the Board and not the courts . . . to make [the] determination, based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity. In fashioning its remedies under the broad provisions of

> §10(c) of the Act (29 U.S.C. §160(c)), the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts. *See Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964). "[I]t is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency." *Consolo v. FMC*, 383 U.S. 607, 621 (1966).

Gissel, 395 U.S. at 612 n.32. The Court could not have been more clear in its limitation of review, yet circuit judges continue to be so "profoundly convinced of their own expertise in such matters," *NLRB v. General Stencils, Inc.*, 472 F.2d 170, 176 (2d Cir. 1972) (Hays, J., dissenting), that they freely impose procedural rules on the Board when the remedy chosen is a bargaining order. Our review is much more limited: was there substantial evidence to support the factual findings? or, was the decision arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law?

Of course the Supreme Court does not require reviewing courts to rubber-stamp NLRB decisions. Rather, the Court has required the Board to provide some articulation of the reasons for its decisions. *See NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 443-44 (1965);[6] *see also SEC v. Chenery Corp.*, 332 U.S. 194, 195-96 (1947) (*Chenery II*) (administrative decision

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6. "[C]ourts may not accept appellate counsel's post hoc rationalizations for agency action . . . ." *Burlington Truck Lines v. United States*, [371 U.S. 156, 168 (1962)]; *see Securities & Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 [1947]. For reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review. Such action would not vindicate, but would deprecate the administrative process for it would "propel the court into the domain which Congress has set aside exclusively for the administrative agency."

380 U.S. at 444 (citation omitted).

must reveal its basis). These precedents, however, do not authorize the meticulous inquiry this court undertakes in every *Gissel* case. They require no more than an indication that the agency has in fact exercised its discretion. *See Metropolitan Life*, 380 U.S. at 443. It is up to the agency to decide how detailed this explanation must be once it crosses the minimum threshold of clarity.[7] If the record is insufficient to reveal the bases for the decision, the court can remand to the agency for "such additional explanation of the reasons for the agency decision as may prove necessary." *Camp v. Pitts*, 411 U.S. 138, 143 (1973). Even in conceding that a remand may at times be appropriate, however, the Court indicated that minimal explanations suffice. "The [agency's] explanation may have been curt, but it surely indicated the determinative reason for the final action taken: the finding that a new bank was an uneconomic venture in light of the banking needs and the banking services already available in the surrounding community." *Id.* Al-

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7. Justice Frankfurter, speaking for the Court in *SEC v. Chenery*, 318 U.S. 80, 95 (1943) (*Chenery I*), indicated that the "articulation requirement" is quite minimal:

> In finding that the Commission's order cannot be sustained, we are not imposing any trammels on its powers. We are not enforcing formal requirements. We are not suggesting that the Commission must justify its exercise of administrative discretion in any particular manner or with artistic refinement. We are not sticking in the bark of words. We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its actions can be sustained.

There the considerations urged in support of the SEC's order were not those on which the SEC relied. Thus the holding in *Chenery I*, reiterated in *Chenery II*, was nothing more than the familiar requirement that an administrative order cannot be sustained if based on a misperception of the law, even if it might be sustained on other grounds not articulated by the agency. To hold otherwise would allow a court to substitute its discretion for that of the agency, confusing administrative review with the kind of review applied to district court decisions.

though it remanded the case to the court of appeals, it suggested that little else need be said for the court to review the decision. Nor do I understand the Supreme Court to require more exhaustive explanations when the NLRB chooses to impose a *Gissel* bargaining order simply because elections are a favored manner of selecting a bargaining representative. *Cf. NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 407-408 (1962) (per curiam) ("There is no place . . . for one test of the substantiality of evidence in reinstatement cases and another test in other cases.").

The rule applied in the present case goes far beyond the minimum threshold, and the dissent would require far more. As Justice Black observed in *Chenery I*, a judicial requirement of detailed findings as the price of court approval of administrative action will "bog the administrative power in a quagmire of minutiae." 318 U.S at 99 (dissenting opinion). More important, "[h]ypercritical exactions as to findings can provide a handy but an almost invisible gideway enabling courts to pass 'from the narrow confines of law into the more spacious domain of policy.' " *Id.* (quoting *Phelps Dodge*, 313 U.S. at 194).

The Supreme Court has recently reemphasized that federal courts should not interfere with administrative action in areas in which Congress has charged an agency with primary responsibility for settling difficult and complex social problems. It acknowledged that agencies must grant a minimum threshold of procedural rights, but stressed that although "[a]gencies are free to grant additional procedural rights in the exercise of their discretion, . . . reviewing courts are generally not free to impose them if the agencies have not chosen to grant them." *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978). The Court warned:

> [T]his much is absolutely clear. Absent constitutional constraints or extremely compelling circumstances the "administrative agencies 'should be free to fashion their own rules of procedure and to pur-

> sue methods of inquiry capable of permitting them to discharge their multitudinous duties.' " *FCC v. Schreiber*, 381 U.S. [279, 290 (1965)], *quoting from FCC v. Pottsville Broadcasting Co.*, 309 U.S. [134, 143 (1940)]. Indeed, our cases could hardly be more explicit in this regard. . . . [T]he basic reason for [the] decision [in *FCC v. Schreiber*] was the Court of Appeals' serious departure from the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure.
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> We have continually repeated this theme through the years, . . . [W]hile a court may have occasion to remand an agency decision because of the inadequacy of the record, the agency should normally be allowed to "exercise its administrative discretion in deciding how, in light of internal organization considerations, it may best proceed to develop the needed evidence and how its prior decision should be modified in light of such evidence as develops." [*FPC v. Transcontinental Gas Pipe Line*, 423 U.S. 326, 333 (1976)].

435 U.S. at 543-44 (footnotes omitted); *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 312-13 (1979); *Wallace Corp. v. NLRB*, 323 U.S. 248, 253 (1944). The *Armcor* rule simply cannot be justified on grounds that a *Gissel* bargaining order violates "constitutional constraints" or presents "extremely compelling" circumstances. Rather than being one of those "extremely rare" cases, the imposition of a bargaining order as a remedy is typical of the matters Congress delegated to agency discretion for the resolution of labor conflicts.

The rule announced in *Armcor* and applied here ignores the Supreme Court's admonitions and leads to needless friction between the courts and agencies with, at best, marginal benefits for the litigants and employees. In outlining permissible *Gissel* orders, the Supreme Court recognized the complexity of the decision and

clearly left it in the hands of the agency. *See* 395 U.S. at 612 n.32. The Board, in turn, recognizing the peculiarities of each *Gissel* case, has avoided the promulgation of precisely defined rules, instead treating each case on its facts. *See, e.g., General Stencils*, 195 NLRB 1109 (1972).

II.

Because I find no Congressional authority for the rule, I conclude that other reasons underlie its continued use. I perceive two reasons for the rule's vitality even though in practice it yields unpredictable results: first, the rule sounds so obviously good that one opposes it only at the risk of inveighing against motherhood and apple pie, and second, the rule can be manipulated to achieve the subjective ends of the judges as they apply it more or less strictly. I will take the risk, and focus on the second reason. That the rule can be manipulated to produce desired results is evident from the cases this court has decided since *Armcor*.[8] Judge Gibbons has already noted that it is "no secret" that a significant number of judges on this court have been signalling the Board that *Gissel* bargaining orders "are unwelcome in this circuit" while another group of judges is giving quite a different signal. *NLRB v. K&K Gourmet Meats, Inc.*, 640 F.2d 460, 470-71 (3d Cir. 1981) (dissenting opinion) (comparing, *inter alia*, cases cited in note 8, *supra*). The *Armcor* line of decisions took the tack of refusing to enforce *Gissel* orders which recognized the union's representation by concluding that the Board's

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8. *Compare NLRB v. K&K Gourmet Meats, Inc.*, 640 F.2d 460 (3d Cir. 1981); *NLRB v. Crau*, 565 F.2d 1267 (3d Cir. 1977); *Hedstrom Co. v. NLRB*, 558 F.2d 1137, 1148 (3d Cir. 1977) (*Hedstrom I*); *with NLRB v. Garry Mfg. Co.*, 630 F.2d 934 (3d Cir. 1980); *Hedstrom Co. v. NLRB*, 629 F.2d 305 (3d Cir. 1980) (in banc) (*Hedstrom II*); *NLRB v. Daybreak Lodge Nursing and Convalescent Home, Inc.*, 585 F.2d 79 (3d Cir. 1978); *Kenworth Trucks of Philadelphia v. NLRB*, 580 F.2d 55 (3d Cir. 1978).

opinions were so opaque that a remand would be necessary. Like Judge Gibbons, I had hoped that the Board had hit upon a formula for stating its reasons satisfactorily. *See K&K*, 640 F.2d at 471-72. That the present unsophisticated case was voted in banc proves that my hopes were ill-founded.

A superficial reading of the opinions here suggests that the court is split over the application of a settled rule to a given state of facts. I doubt that many perceptive observers of this court will be deceived. The dispute here is not over application of a rule, but over the existence of an entirely different precept: whether the NLRB has the power to order an employer to bargain with a union that has not obtained representation status by an election because of an employer's pervasive unfair labor practices. Although recognizing that *Gissel* is binding precedent, panels of this court have nonetheless tried to subvert it indirectly, focusing their denial of enforcement on the Board's procedural failures. A rule that is manipulated to achieve desired results is not a "neutral principle," and in my view the decisions applying it are not genuinely principled decisions because they do not rest on "analysis and reasons . . . transcending the immediate result . . . ." Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 15 (1959).

The panels and in banc courts will continue to divide as long as the opinions are cast as disputes over application of this dubious precept, settled though it may be. The precedential impact of cases at this level of dispute is severely limited by the facts presented. This in banc offering contains no assurance that panels will apply the rule more evenhandedly because each subsequent case will be factually distinguishable, and it may be that similar cases will be before us in banc (for who is to say that thrice is the limit stop of jural masochism?) as the particular labor-management philosophy of the randomly selected panel members continues to produce in-

consistent results.[9] *In fine*, the *Armcor-Hedstrom* rule permits a two-judge panel majority to foist on the Board its notions of our national labor policy in a given case or controversy, a practice directly contrary to the Congressional mandate which has lodged this responsibility in the NLRB.

III.

In addition to hostility to *Gissel* bargaining orders, I also detect in the *Armcor-Hedstrom* rule a distrust of the persons charged with making an initial determination of the necessity of a *Gissel* bargaining order, the administrative law judges. This view is confirmed by the *Baerga-Hargenrader* line of cases, in which this court has imposed increasingly rigorous factfinding requirements on Social Security Administration ALJs *only* when the decision of the ALJ is to deny social security disability benefits. *See Cotter v. Harris*, 642 F.2d 700, 708-712 (3d Cir. 1981) (Garth, J. dissenting). Such distrust, I suspect, stems from a belief that ALJs are second-class judges (if judges at all), marginally qualified, beholden to the employing agency, and, often, veterans of the agency whose cases they now decide. Many Article III judges, as well as scholarly critics and attorneys, consider the federal judiciary's life tenure, employment by a separate branch, and other indicia of independence to be singular assurances of impartial judgment and easily scorn agency "employees" who perform judicial functions without the full investiture of Article III privileges.

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9. As a dispute over application of law to facts, this case does not meet our usual requirements for rehearing in banc. This court's Internal Operating Procedure VIII B. provides: "This court does not ordinarily grant rehearing in banc where the panel's statement of the law is correct and the controverted issue is solely the application of the law to the circumstances of the case."

Accepting for purposes of argument that to be impartial judges must be independent of all political or employment pressures, I submit that the view that the ALJs are not sufficiently independent or competent is now so shopworn as to be totally obsolete. To the contrary, ALJs, though not yet annointed with life tenure, enjoy an independence that in my view is plainly sufficient to satisfy reasonable doubts.[10]

For example, although ALJs are considered agency personnel, they are selected by the Office of Personnel Management (OPM) independently of agency recommendation or rating, 5 U.S.C. §5362, and cannot be removed from office without a hearing establishing good cause before the Merit Systems Protection Board, 5 U.S.C. §7521. Their pay is controlled by the Civil Service Commission. ALJs can be disqualified from a case only upon petition by either the agency or a private party. 5 U.S.C. §556(b). Similarly, cases are assigned on a rotating basis so that the agency cannot "fix" the result by choice of judge. 5 U.S.C. §3105. They are not subject to the whim of the agency. ALJs are strictly independent of investigative or prosecutorial personnel in the agency. 5 U.S.C. §554(d).

Moreover, the selection process for ALJs should inspire more respect for this office than is generally extended by Article III judges; it is a process that requires rigorous inquiries into the background and competence of the candidates. Applicants must supply twenty professional references. A minimum of seven years of litigation experience is required to meet the threshold selection requirement. A test opinion must be drafted and evaluat-

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10. *See generally* Lubbers, *Federal Administrative Law Judges: A Focus on our Invisible Judiciary*, 33 Admin.L.Rev. 109 (1981); Admin. Conference of the United States, Federal Administrative Law Judge Hearings 7-20 (1980). *Cf. Nash v. Califano*, 613 F.2d 10 (2d Cir. 1980) (ALJ has standing to challenge attempted interference with decisional independence by Social Security Administration).

ed on the basis of many factors including clarity and conciseness. *See* Office of Personnel Management, Announcement No. 318, Administrative Law Judge 13-16 (1979). Finally, after the various scores have been combined, applicants considered tentatively eligible are interviewed by a special panel usually composed of an OPM official, an attorney qualified in the field of administrative law, and an agency official. This committee submits a recommendation to the director of OPM who makes final eligibility determinations among qualified candidates. Once appointed to an agency, an ALJ is not subjected to the usual probationary employement period for agency employees, further insuring ALJ independence. 5 U.S.C. §3321.

The Supreme Court recognized in *Butz v. Economou*, 438 U.S. 478 (1978), that ALJs are "functionally comparable" to judges employed in the judicial branch and conferred on them absolute immunity for judicial acts. In doing so the Court observed:

> There can be little doubt that the role of the modern federal hearing examiner or administrative law judge within this framework is "functionally comparable" to that of a judge. His powers are often, if not generally, comparable to those of a trial judge. . . . More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency. Prior to the Administrative Procedure Act, there was considerable concern that persons hearing administrative cases at the trial level could not exercise independent judgment because they were required to perform prosecutorial and investigative functions as well as their judicial work . . . and because they were often subordinate to executive officials within the agency . . . . Since the securing of

> fair and competent hearing personnel was viewed as "the heart of formal administrative adjudication," Final Report of the Attorney General's Committee on Administrative Procedure 46 (1941), the Administrative Procedure Act contains a number of provisions designed to guarantee the independence of hearing examiners.

438 U.S. 513-14 (citations omitted).

The rigors of the selection procedure and the statutory protections of ALJ independence suggest to me that the federal judiciary need not look down its collective nose at ALJ decisions. *Cf. Eastern Engineering & Elevator Co., Inc. v. NLRB*, 637 F.2d 191 (3d Cir. 1980) (NLRB must respect special competence of ALJ who has the benefit of first-hand observation of witnesses). I am not proposing that the judiciary abandon all distinctions between ALJs and Article III judges when reviewing decisions, for Congress has clearly intended that review be on a different level. Of course, in the review of the choice and application of legal precepts, a judicial function dramatically different from reviewing factfinding, I have not been loath to criticize either the ALJ or the agency. *See Allegheny General Hospital v. NLRB*, 608 F.2d 965, 967-69 (3d Cir. 1979). But I perceive that under the legislative schema, at least in the context of factfinding, the difference may well be more tenuous than our decisions in the *Gissel* and *Hargenrader* context indicate.

IV.

I concur in the judgment enforcing the bargaining order in this case, but I reject the standard applied to the Board's decision. I reject the standard because it represents unwarranted interference with choices committed by Congress to the agency and thereby impedes the development of a coherent national labor policy by the NLRB. I also reject the standard because it is a rule ap-

plied to achieve results not based on the reasons given. I am convinced that as long as the court continues to anatomize the Board's reasons for imposing a bargaining order, these cases will continue to be self-inflicted wounds that will drain our energies: energies that should be husbanded, not dissipated.

GARTH, *Circuit Judge*, concurring in part and dissenting in part, with whom Judges Hunter and Weis join:

I.

I agree with the majority that there is substantial evidence to support the Board's findings of unfair labor practices. I also agree with the majority's reaffirmance of our precedents which require that the Board articulate its reasons for imposing a bargaining order. Maj. op. typescript at 11; *Hedstrom Co. v. NLRB*, 629 F.2d 305 (3d Cir. 1980) (*en banc*) (*Hedstrom II*); *NLRB v. Armcor Indus., Inc.*, 535 F.2d 239 (3d Cir. 1976). I do not agree, however, that either the ALJ or the Board complied with our articulation requirement and thus I would deny enforcement of the bargaining order.

II.

Both the majority and I recognize this court's insistence that the Board explain why it imposed a bargaining order rather than ordering a re-run election. In this respect we are all aware that the Supreme Court has admonished the Board that elections are the preferred way to ascertain whether a union has majority support. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969). The Second Circuit has summarized the law governing the Board's choice of remedies for employer unfair labor

practices committed during a representation election as follows:

> Where an employer's misconduct taints a prior union election by adversely affecting the employees' freedom of choice, the traditional remedy, frequently characterized as the "preferred" or "superior" remedy, see *NLRB v. Jamaica Towing, Inc.*, 602 F.2d 1100, 1104 (2d Cir. 1979); *Donn Products, Inc. v. NLRB*, 613 F.2d 162, 165 (6th Cir. 1980); *Peerless of America, Inc. v. NLRB*, 484 F.2d 1108, 1122 (7th Cir. 1973), has been to (1) vacate the election, (2) enjoin the employer from engaging in such misbehavior, (3) require him to post "contrition" notices to his employees, disavowing any future interference, and (4) direct him to give union representatives reasonable access to the employees. This is then followed by a new Board-supervised election. The issuance by the Board of a bargaining order in lieu of a cease-and-desist order is only proper if, after an objective review of all of the relevant surrounding circumstances, including the nature of the employer's misbehavior and any later events bearing on its impact on the employees, it may reasonably be concluded that the employees will be unable to exercise a free choice in an Board-supervised rerun election.

Thus, to deny an election, and by so doing, to disenfranchise the employees, the circumstances must be egregious, and the reasons for the denial must be explained.[1] The only difference between the majority's

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1. Judge Weis has expressed his views as to why bargaining orders should not be issued in an ordinary case:

> Routine issuance of bargaining orders after a review of the facts and a conclusory finding that the unfair labor practices were "egregious," "pervasive" or "chilling" is simply unacceptable. Bargaining orders have been defended as a necessary sanction to deter misconduct by an overreaching employer, but

opinion and this opinion is that whereas the majority is satisfied with the Board's "explanation", I am not. In order to explain my position respecting the absence of explanation and articulation by the Board in this case, a brief review of the context in which the problem arises is necessary.

Any discussion of bargaining orders must start with *Gissel* which established two categories of cases in which bargaining orders may be imposed. I agree with the majority that here we are concerned with a *Gissel II* case. *See* maj. op., typescript at 11, n.1. In *Gissel II* cases — "less extraordinary cases marked by less pervasive practices which nevertheless still have the tendency to undermine majority strength and impede the election process", *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969) — it first must be shown that at one point the union had a majority. The Board then should consider:

> the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future.

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such orders do not affect the employer alone — they also fall on employees. It is they who lose the right to vote in favor of one union or another or none at all — rights that the National Labor Relations Act guarantees to them. Moreover, the Board's remedies should right the wrong — not act as punitive measures. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 61 S. Ct. 77, 85 L. Ed. 6 (1940).

In imposing bargaining orders, the Board is subordinating the employee's right to express his choice to its forecast as to who would have won the election if the employer had maintained laboratory conditions. When that prediction is little more than a guess, however, the Board's paternalism does not justify depriving the employees of their vote. The extreme response of a bargaining order should be the exception and not the norm — a principle recognized by this court in *Armcor* and *Hedstrom*. *Electric Prods. Div. of Midland-Ross v. NLRB*, 617 F.2d 977, 991 (3d Cir.), *cert. denied* 49 USLW 3249 (1980) (Weis, J., dissenting) (footnotes omitted).

> If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue . . .

Id.

We have implemented this teaching by persistently requiring that the NLRB explicate the basis for the imposition of a bargaining order. *See Kenworth Trucks v. NLRB*, 580 F.2d 55, 59-60 (3d Cir. 1978); *NLRB v. Craw*, 565 F.2d 1267, 1271-72 (3d Cir. 1977); *NLRB v. Eagle Material Handling, Inc.*, 558 F.2d 160, 166-68 (3d Cir. 1977); *Hedstrom Co. v. NLRB*, 558 F.2d 1137 (3d Cir. 1977) (*Hedstrom I*); *NLRB v. Armcor Indus., Inc.*, 535 F.2d 239 (3d Cir. 1976). This requirement aids our review of a petition for enforcement by helping to ensure that the Board has given full consideration to the preferred alternative of a re-run election. *See Armcor, supra* at 245.

In the *en banc* decision of *Hedstrom II*, we wrote:

> The primary purpose of this requirement is to assist a reviewing court in determining whether the standards of *Gissel* have been satisfied. Since the propriety of a bargaining order depends upon the existence of certain circumstances, it is fitting for the board to "explain with specificity the results of the unfair labor practices and, in particular, the unlikelihood of a fair election," *NLRB v. Craw*, 565 F.2d 1267, 1272 (3d Cir. 1977), before seeking enforcement of such an order. This is not to say, of course, that a reasoned elaboration of the basis for a bargaining order by itself will assure that a careful weighing of the evidence has occurred, but only that it should help to further such an aim.

Id. at 309 (footnote omitted).

Appendix A

Our court held in *Hedstrom II* that the Board must provide a reasoned analysis, setting forth those factors justifying the imposition of a bargaining order. The analysis need not be elaborate, but the Board must:

> 'estimate the impact [of the unfair labor practices], taking into account the factors in the particular case which are indicative of actual effect or which plausibly, in the light of existing knowledge, would contribute to or detract from an actual impact,' and appraise 'those factors which might reasonably have a bearing' on the likelihood of a fair rerun election.

Hedstrom II at 309 *quoting Peerless of America, Inc. v. NLRB*, 484 F.2d 1108, 1118 n. 16 (7th Cir. 1973). *Peerless* was also quoted in *Kenworth Trucks of Philadelphia v. NLRB*, 580 F.2d at 60, *NLRB v. Craw*, 565 F.2d at 1271, and *NLRB v. Armcor Industries, Inc.*, 535 F.2d at 245.

Hedstrom I had resulted in a remand to the Board because no such analysis, articulation or explanation had been made by the Board in justifying the imposition of a bargaining order. Thereafter, in *Hedstrom II*, the Board, complying with our directive, explained that a bargaining order was necessary and that a rerun election could not fairly be ordered. On the record of that case the Board found that:

> the total effect of the threats of closure, and the numerous other unfair labor practices against the background of the general awareness of the Fitchburg experience, was to instill in employees a strong fear of loss of employment that would continue to be operative even in the event of a second election. This fear could only have been exacerbated by the publication of the newspaper editorial.
>
> We find that "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee senti-

> ment once expressed through cards would, on balance, be better protected by a bargaining order. . . ."[11] This conclusion is not significantly affected by the reviewing court's reversal of our finding that President Ketcham violated Section 8(a)(1) by threatening to fire an employee. The reversal does not disturb any of the findings concerning the threats of plant closure, or the overall context in which those threats occurred, which form the basis for our conclusion that a bargaining order is warranted.
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> 11. N.L.R.B. v. Gissel Packing Co., 395 U.S. at 614-615.

(Appendix *Hedstrom II* at 10a) (footnotes 10 and 12 omitted).

In further compliance with our requirements, the Board also reasoned and explained that the passage of time had not increased the prospects of a fair election:

> the effect of Respondent's threats of plant closure and its extensive unfair labor practices during the course of the campaign was to instill in employees the fear that they would lose their jobs through plant closure if the Union won the election. There is nothing to indicate that this fear has been erased during the past 3 years. To the contrary, recent events indicate that Respondent's vigorous opposition to the Union continues to result in unfair labor practices, thereby sustaining, reinforcing, or increasing the fear that the Company might still carry out its earlier threat to close operations if the Union prevails.

(Appendix 11a-12a). Finally, the Board re-examined our reversal of the Section 8(a)(5) violation and concluded that even absent that violation, a bargaining order was necessary.

A majority of this court held that the Board's explanation satisfied our mandate of a "reasoned analysis."

Our court is not alone in requiring the Board to explain its reasons for rejecting a re-run election in favor of imposing a bargaining order.[2] The Seventh Circuit, whose opinion in *Peerless of America Inc. v. NLRB*, 484 F.2d 1108 (7th Cir. 1973) was relied upon by this court in *Hedstrom II*, *Craw* and *Armcor*, has again forcefully reiterated an identical instruction to the Board in *Red Oaks Nursing Home v. NLRB*, 633 F.2d 503 (7th Cir. 1980). The court in that case found the Board's reasons for imposing a bargaining order insufficient. The ALJ, in an opinion adopted by the Board, had stated:

> I do not, however, consider the unfair labor practices committed to be minor in view of their nature, number, and extent of probable impact throughout the bargaining unit. In my opinion, neither the factors recited above nor the Board's traditional remedies for Section 8(a)(a) violations render it likely that another election would result in a truer measure of uninhibited employee choice than the authorization cards executed on or before August 22, 1977. I therefore in all the circumstances of this case find that the Respondent's unfair labor practices have undermined the Union's majority and made the holding of a fair election most unlikely, and recommend that the petition in Case 25-RC-6717 be dismissed and the Respondent be ordered to bargain on request.

Quoted in *id.* at 509.

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2. *See, e.g.*, NLRB v. Jamaica Towing, Inc., 632 F.2d 208, 211 (2d Cir. 1980); Chromalloy Mining and Minerals v. NLRB, 620 F.2d 1120, 1129-30 (5th Cir. 1980); NLRB v. Appletree Chevrolet, Inc., 608 F.2d 988, 998 (4th Cir. 1979); NLRB v. Pilgrim Foods, Inc., 591 F.2d 110, 119 (1st Cir. 1978); NLRB v. Pacific Southwest Airlines, 550 F.2d 1148, 1152 (9th Cir. 1977); Peerless of America, Inc. v. NLRB, 484 F.2d 1108 (7th Cir. 1973).

In denying enforcement of the Board's order, the Seventh Circuit wrote:

> the opinion of the ALJ contains no consideration of the effectiveness of the ordinary remedies, the continuing impact of the unfair labor practices on the election process, and the probability of repeated violations, which are also prerequisites for a bargaining order. *See Peerless, supra*, 484 F.2d at 1118. By not stating separately why the circumstances of this case require a bargaining order, the Board appears in effect to be automatically issuing bargaining orders on the basis of virtually *any* unfair labor practice, a policy clearly not in accordance with *Gissel*. *See NLRB v. Appletree Chevrolet, Inc.*, 608 F.2d 988, 998, 103 LRRM 2066 (4th Cir. 1979).

Id. at 509-510 (footnote omitted, emphasis in original).

It is thus evident that this Circuit is not the only circuit that requires the Board to provide an adequate articulation of reasons before it issues a bargaining order.

Requiring the Board to articulate its reasons for imposing a bargaining order does not represent an unwarranted judicial interference with administrative procedure. Indeed that requirement, as we have pointed out, stems from the Supreme Court's instructions in *Gissel*, and from fundamental rules of administrative law. *See, e.g., SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947); 5 U.S. §557(c)(3)(A)(1976). The Supreme Court has consistently instructed that

> [i]f the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, "We must know what a

> decision means before the duty becomes ours to say whether it is right or wrong." *United States v. Chicago, M., St.P.& P.R. Co.*, 294 U.S. 499, 511.

Chenery at 196.

This basic requirement which focuses on effective judicial review cannot be deemed to constitute an undue burden on the Board, and does not intrude upon internal Board procedures in a manner proscribed by the principle expressed in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). *See Kenworth Trucks v. NLRB*, 580 F.2d 55, 61-63 (1978). Our requirement of reasoned articulation does no more than mandate that the Board inform us of the basis upon which its decision is predicated. "When the Board . . . exercises the discretion given to it by Congress, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 197." *NLRB v. Metropolitan Insurance Co.*, 380 U.S. 438, 443 (1965). The obligation of reasoned analysis is essential to perform our reviewing function and to guarantee the integrity of the administrative process.

III.

I cannot agree with the majority that the opinion of the administrative law judge adopted by the Board in this case, satisfies the standard set forth in *Hedstrom II*. When contrasted with the analysis and articulation of the Board in *Hedstrom II*, it is quite apparent that the conclusory discussion of the administrative law judge in this case is woefully deficient. It is even less detailed than the analysis rejected in *Red Oaks*. Virtually the entire thrust of the ALJ's discussion here was focused not on the reasons why a fair re-election was impossible, but rather on the reasons why the initial election of

December 30, 1977 had to be set aside. After summarizing the unfair labor practices found, he stated:

> In sum, Respondent sought to impress upon the employees the futility of voting the Union in, and that there would be harsher dealing and reprisal if they did. The mass of violations of Section 8(a)(1), (3), and (4) of the Act were egregious unfair labor practices, which had the tendency to undermine, and undermined, the Union's majority strength in the election of December 30, 1977, and prevented the holding of a fair election.
>
> By refusing to recognize and bargain with the Union, as requested on November 11, 1977, and instead engaging in this course of unlawful conduct which undermined the Union's majority status and prevented the holding of a fair election, Respondent also violated Section 8(a)(5) of the Act, *Trading Port, Inc.*, 219 NLRB 298, 300-301 (1975).
>
> Under the circumstances of this case, the sentiment of the unit employees expressed through the Union authorization cards is a more reliable measure of their desires on the issue of representation than the election held December 30, 1977. To remedy Respondent's unfair labor practices, including its Section 8(a)(5) refusal to bargain, a bargaining order is necessary, whether the violations be viewed as category one unfair labor practices under *Gissel, supra, see J.P.Stevens & Co., Inc., Gulistan Division v. N.L.R.B.*, 441 F.2d 514, 521-522 (C.A. 5, 1971), *cert. denied* 404 U.S. 830, or as category two unfair labor practices, *see N.L.R.B. v. Kaiser Agricultural Chemicals etc.*, 473 F.2d 374, 382-383 (C.A. 5, 1973). The bargaining order will be issued as of the end of October 1977, when Respondent embarked on its course of unlawful conduct.

The reasoning of the ALJ was that since unfair labor practices had prevented the holding of a fair election and

had undermined the union's majority strength, a bargaining order was necessary. At no time did he satisfy the *Hedstrom II* obligation to estimate the impact of the various violations and appraise "those factors which might reasonably have a bearing on the likelihood of a fair re-run election." *Hedstrom II* at 309. The ALJ never discussed in this section of his opinion why "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight . . ." *Gissel* at 614. Only in the conclusions of law section of his opinion does the ALJ state, unsupported by any articulation of reasons, that "these [pre election] unfair labor practices cannot be corrected by conventional remedies, including a rerun election." App. at 50. He failed completely to address, let alone answer, the crucial inquiry whether there was a likelihood that the unfair labor practices would recur, a consideration that *Gissel* indicates should be taken into account. *Gissel* at 614.

Moreover, the ALJ and the Board, in holding that a bargaining order was necessary under *Gissel II*, did not distinguish between *pre-* and *post-card* majority violations. *See Rapid Mfg. Co. v. NLRB*, 612 F.2d 144 (3d Cir. 1979). I agree with the majority that unfair labor practices that occur before a card majority is attained, may, under certain circumstances, support the imposition of a *Gissel II* bargaining order. Yet in my opinion, an inference is present that *pre-card* (as contrasted with *post-card*) majority unfair labor practices do not significantly undermine the union's majority strength. This inference can be drawn because in *Gissel II* cases, where a majority is required, the union obviously gains adherents even after the occurrence of *pre-card* majority unlawful conduct. Normally such pre-majority violations would provide less support for the imposition of a bargaining order than would post-majority violations. Accordingly, when finding that the possibility for a fair re-run election is slight, the Board, if it relies on *pre-card* majority unfair

labor practices, must carry a heavier burden in explaining why this conduct supports its imposition of a bargaining order. No such burden has been satisfied here by the Board. Indeed the ALJ and the Board failed even to distinguish between *pre-* and *post-card* violations. Thus I cannot agree with the majority that the ALJ's opinion, which the Board adopted, satisfies the *Gissel* or *Hedstrom II* requirements.[3]

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3. I recognize that the "articulation" of the administrative law judge which was adopted by the Board in Kenworth Trucks v. NLRB, 580 F.2d 55 (3d Cir. 1978) could be equated in some respects to the articulation of the Board which we reject in this case. But I am satisfied that *Kenworth* does not compel the enforcement of the Board's order here. Nowhere in *Kenworth* did the Court address the sufficiency of the ALJ's explanation. Instead the *Kenworth* panel, as Chief Judge Seitz's opinion recognizes, maj. op., typescript at 15 n.2, focused on whether the Board itself, as distinct from the ALJ, was required to analyze and articulate the reasons for the issuance of a bargaining order. After first holding that the Board had an independent obligation to formulate the reasons for issuing a bargaining order, the court on rehearing held that a separate articulation was not necessary: the Board could simply adopt the ALJ's explanation. After having decided the central issue before it, the court then proceeded to enforce the Board's order, without assessing the sufficiency of the ALJ's articulation of reasons.

On its face, the discussion implicitly accepted by the court in *Kenworth* is not dissimilar to the conclusory discussion found in this case. However, as I have pointed out, the court in *Kenworth* did not direct its attention to the adequacy of the ALJ's analysis. Thus, *Kenworth* may not be construed as holding that a conclusory analysis and conclusory articulation of reasons for the imposition of a bargaining order is all that is required. Even if *Kenworth* was construed as standing for such a proposition, our decision in *Hedstrom II* filed some two years after *Kenworth* and issuing from an *en banc* court clearly demonstrates that the type of conclusory statement found in *Kenworth* may not be relied upon to support a bargaining order.

Hence, whatever vitality may have once been attributed to such a construction of *Kenworth*, has been thoroughly undermined by *Hedstrom II*, and cannot fairly be read as diluting the *Hedstrom II* standard reaffirmed today.

I do not believe that it is incumbent upon the members of this court to point out constantly and repetitively those factors which the Board must consider before it concludes that a fair re-run election cannot be held and that a bargaining order must be imposed. The Board, not the court, has the statutory burden of determining which remedy is appropriate. 29 U.S.C. §160(c)(1976). *See Gissel* at 612 n. 32.[4] Certainly this court alone has furnished more than ample guidance to the Board, as to what is expected in meeting this burden.

At the least, the Board in its review of the ALJ's findings, should have considered: the closeness of the vote; the extent to which the impact of the unfair labor practices persisted in the minds of the employees and whether this impact likely would have tainted a future election; the change in the composition of the workforce; the status of the Mennen contract; the weight to be given *pre-card* majority violations; the effect of the passage of time; the probability of repeated violations by Permanent Label; and the effectiveness of preferred traditional remedies. There are undoubtedly other factors and facts that the Board should have considered, but since this court has repeatedly instructed the Board in various contexts as to what constitutes a proper analysis, *see Hedstrom II* at 311-12; *Rapid Mfg. Co., supra; NLRB v. Garry Mfg. Co.*, 630 F.2d 934, 946 (3d Cir. 1980) (Weis, J., dissenting); *Electrical Prods. Div. of Midland-Ross Corp. v. NLRB*, 617 F.2d 977, 990 (3d Cir.) *cert. denied* 49 USLW 3249 (1980) (Weis, J., dissenting), I am loathe to once again tread the same ground.

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4. *Cf.* Red Oaks Nursing Home v. NLRB, 633 F.2d 503, 509 (7th Cir. 1980) ("typically, this court has reached the merits of the propriety of the order, in part to avoid further compromise of employee rights inherent in the delay of remand. . . . Thus, the effect of the Board's continuing neglect to fashion standards for the exercise of its discretion is to place exclusive reliance on judicially prescribed standards for determining the need for bargaining orders, a practice not contemplated by section 10(c) of the Act.")

I do not believe that we as a court should be forced to infer from the ALJ's opinion, which lacks a reasoned articulation, what the ALJ intended to explain to justify the bargaining order. The majority in its interpretation of the ALJ's opinion, maj. op., typescript at 15, has for the first time supplied the required articulation of reasons which neither the ALJ nor the Board furnished. It is possible that these are the same reasons which the Board would have articulated in explaining its denial of a re-run election. But then again, the possibility exists that the Board's explanation may have differed from that now provided by the majority. It is for that very reason that the Supreme Court emphasized the following:

> simple but fundamental rule of administrative law . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.

Securities and Exchange Commission v. Chenery, 332 U.S. 194, 196 (1947).

Because in this case the Board has once again failed to comply with our oft-repeated instructions, I would deny enforcement to its order so that a re-run election could immediately be ordered[5] or at the very least, I

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5. The longer a re-run election is delayed the less likely the union's chances of reversing the outcome of the first election. *Gissel* at 611 n. 30. A remand also raises the possible need for further judicial review, and hence further delay.

would remand for the explanation which this court requires. Thus, to the extent that the majority would give effect to the bargaining order, I respectfully dissent from the majority's opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

Order of the National Labor Relations Board Amending Decision and Order

Clifton, N.J.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

PERMANENT LABEL CORPORATION

and

DISTRICT 65, DISTRIBUTIVE WORKERS OF AMERICA

Cases 22-CA-8027
22-CA-8144
22-CA-8192
22-RC-7335

ORDER AMENDING DECISION AND ORDER

On March 4, 1980, the Board issued a Decision and Order[1] in the above-entitled proceeding, in which it

[1] 248 NLRB No. 21.

adopted as its Order, the recommended Order of the Administrative Law Judge with certain modifications.

IT IS HEREBY ORDERED that said Decision and Order be, and it hereby is, amended by adding to the Board's Order, the following paragraph:

> IT IS FURTHER ORDERED that the petition filed herein in Case 22-RC-7335 be, and it hereby is, dismissed.

IT IS FURTHER ORDERED that the Decision and Order, as printed, shall appear as hereby amended.

Dated, Washington, D. C., March 13, 1980.

By direction of the Board:

JOSEPH E. MOORE
Acting Executive Secretary

Appendix B

Decision and Order of the National Labor Relations Board, 248 NLRB No. 21

248 NLRB No. 21

FJT
D—6168
Clifton, N.J.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

PERMANENT LABEL CORPORATION

and

DISTRICT 65, DISTRIBUTIVE WORKERS OF AMERICA

Cases 22-CA-8027
22-CA-8144
22-CA-8192
22-RC-7335

DECISION AND ORDER

On October 9, 1979, Administrative Law Judge Herzel H. E. Plaine issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief and, the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Appendix B

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2]

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

The Administrative Law Judge dated the bargaining obligation from the end of October, when Respondent commenced its unfair labor practices. However, the Union attained majority status only on November 9. We therefore date the bargaining obligation from November 11, 1977, the date of Respondent's refusal to bargain in the context of its unfair labor practices at a time when majority was established. *Idak Convalescent Center of Fall River, Inc., d/b/a Crawford House*, 238 NLRB No. 59 (1978) (Member Jenkins concurring).

[2] Respondent cites *Pillows of California*, 207 NLRB 369 (1973), as support for its contention that certain actions directed toward three employees, who it argued were supervisors, were not violations of Sec. 8(a)(1). Respondent's reliance on *Pillows* is misplaced. There, the Administrative Law Judge found the respondent had a good-faith belief of the employee's supervisory status, unlike Respondent's contrived "flimsy basis" for such belief as found by the Administrative Law Judge here. It is on this basis, i.e., lack of a good-faith belief on Respondent's part, that we affirm the finding of the 8(a)(1) violations directed toward the three employees.

of the Administrative Law Judge and to adopt his recommended Order as modified herein.[3]

248 NLRB No. 21

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Permanent Label Corporation, Clifton, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete "as of the end of October 1977" from paragraph 2 (a).

2. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. March 4, 1980

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

John C. Truesdale, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

[3] In par. 1(n) of his recommended Order, the Administrative Law Judge provided that Respondent cease and desist from "in any other manner" interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed by Sec. 7 of the Act. We agree that a broad order is warranted in this case but we do so for the reasons set forth in *Hickmott Foods, Inc.*, 242 NLRB No. 177 (1979).

Appendix B

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which both sides had the opportunity to present their evidence, the National Labor Relations Board has found that we violated the law and has ordered us to post this notice and we intend to abide by the following:

WE WILL NOT coercively interrogate employees concernig union organizing, or who supplied union cards, or the employees' interest in District 65, Distributive Workers of America, or any other labor organization.

WE WILL NOT threaten employees with loss of jobs if they bring the above-named Union into the plant.

WE WILL NOT threaten employees that there will be no correction of grievances if employees bring the Union into the plant.

WE WILL NOT discharge, suspend, or otherwise discipline employees for engaging in union activities.

WE WILL NOT solicit grievances and promise benefits or correction of grievances to induce employees to abandon the Union.

WE WILL NOT grant bonuses or other benefits to induce employes to abandon the Union.

Appendix B

WE WILL NOT interfere with employees' wearing of union insignia.

WE WILL NOT instruct employees, under threat of discipline, to desist from engaging in union activities.

WE WILL NOT promulgate or enforce rules prohibiting solicitation by employees of union membership in plant work areas or nonwork time, or distribution of union literature by employees in nonwork areas during nonwork time.

WE WILL NOT coercively induce or attempt to induce influential employees to induce other employees to cease support of the Union.

WE WILL NOT suspend or otherwise discipline employees for attending National Labor Relations Board conferences to assist the Union in connection with union representation of the employees.

WE WILL NOT discourage employees from support of, or membership in, the Union or any other labor organization by discharge, suspension, or other discrimination affecting their tenure or other conditions of employment.

WE WILL NOT refuse, upon request, to bargain with the Union as the exclusive collective-bargaining representative of the bargaining unit of our Clifton plant employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act.

Appendix B

WE WILL, upon request, bargain with the District 65 Distributive Workers of America, as the exclusive collective-bargaining representative of the bargaining unit comprising all of our employees employed at the Clifton, New Jersey facility but excluding all office clerical employees, professional employees, managerial employees, guards, assistant supervisors and all other supervisors as defined in the Act, and, if an agreement is reached, embody it in a written contract.

BECAUSE the Board found that we unlawfully discharged employees Bernard Daly and Eleanor Ott on November 2, 1977, and then reduced the discharge to unlawful suspension for each to November 16, 1977, and also unlawfully suspended employees Michael Roberts, Robert Linderoth, and Eleanor Ott for 1 day on November 29, 1977.

WE WILL give each of them backpay with interest for the respective times of their suspensions.

WE WILL expunge from our records any references to discipline of these employees in connection with the occasions for these suspensions.

PERMANENT LABEL CORPORATION

.....

(Employer)

Dated ..... By .....

Representative (Title)

Appendix B

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Peter D. Rodino Jr. Federal Bldg., Room 1600, 970 Broad Street, Newark, New Jersey 07102, Telephone 201—645-3652.

Appendix B

Decision of the Administrative Law Judge

JD-728-79
Clifton, N.J.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PERMANENT LABEL CORPORATION

Respondent-Employer

and

DISTRICT 65, DISTRIBUTIVE WORKERS OF AMERICA

Charging Party-Petitioner

Cases 22-CA-8027
22-CA-8144
22-CA-8192
22-RC-7335

Beth S. Waxman, Esq. and
Paul A. Montalbano, Esq.,
of Newark, NJ, for the
General Counsel.

Appendix B

Martin R. Pachman, Esq. of
Pachman, Aron and Till,
of Jersey City, NJ, for
the Respondent.

Brian N. Flynn, Esq. of
Krieger and Chodash, of
Jersey City, NJ,
Charging Party-Petitioner.

DECISION

HERZEL H. E. PLAINE, Administrative Law Judge:

Permanent Label Corporation (Respondent), a processor, engaged in the business of labeling and decorating plastic containers for use by manufacturers and distributors of cosmetics, drugs, and household products, was the object of union organizing of its Clifton, New Jersey plant by District 65, Distributive Workers of America (the Union) in the fall of 1977. The Union demanded recognition from Respondent on November 11, 1977, but was refused, and the campaign culminated in a Board conducted election on December 30, 1977. The Union lost the election by a vote of 54 for and 65 against.[1]

As the result of Union objections to conduct affecting the results of the election, preceded and followed by unfair labor practice charges against Respondent filed by the Union, the complaints that issued and the unresolved

[1] Originally there were 13 challenged ballots, ultimately reduced to 6, by the opening of trial. The 6 challenged ballots could not affect the outcome of the election; nevertheless the supervisory or the bargaining unit status of the six individuals has a bearing on the outcome of the consolidated cases.

objections in the representation case were consolidated for trial.[2]

The complaint alleges violations by Respondent of Section 8(a)(1), (3), (4) and (5) of the National Labor Relations Act (the Act) and requests a bargaining order as the remedy. The allegations include Section 8(a)(1) coercive interrogation, soliciting of grievances, enforcement of unlawful no solicitation—no distribution rules, promise and grant of benefits to discourage Union support, coercion regarding the wearing of Union insignia, coercion of employees to induce other employees to cease Union support, threats of reprisals including loss of jobs, and instructions to three employees to cease support of the Union; Section 8(a)(3) discharges of two employees; Section 8(a)(4) suspensions of three employees for attending a Board proceeding; and Section 8(a)(5) refusal to bargain. General Counsel contends that a bargaining order is the appropriate remedy to cure otherwise irremedial interference with the free choice of the employees in the representation election

Respondent has denied any wrongdoing. Respondent further claims that three members of the in-plant Union organizing committee were statutory supervisors thereby invalidating any Union authorization cards obtained by

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[2] The charge in CA-8027 was filed November 9, 1977, complaint filed December 27, 1977; the petition in RC-7335 was filed November 14, 1977; the charge in CA-8144 was filed January 9, 1978, and the charge in CA-8192 was filed January 31, 1978. On February 24, 1978 an order consolidating two of the CA cases and a first amended complaint was issued. Ultimately on May 24, 1978, an order consolidating all of the cases and a second amended complaint was issued, further amended June 1, 1978.

their participation, and contends that as a result the Union did not represent a majority of the bargining unit employees. Respondent requests that the election result be confirmed.

The consolidated cases were tried in Newark, New Jersey, on June 15, 16, 20, 21, 22, 23, and August 22, 23, and 24, 1978. General Counsel and the Respondent have filed briefs.

Upon the entire record of the cases, including my observation of the witnesses and consideration of the briefs, I make the following:[3]

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[3] At trial on August 23, 1978, General Counsel offered in evidence GC-98 for identification, which was employee Bernard Daly's copy of the report from Respondent's workmens compensation insurance carrier, New Jersey Manufacturers Insurance Company, of the specific days, totaling 4-2/7 weeks, from March 8 to return to work April 18, 1977, for which the carrier had paid Daly temporary compensation for injury to his hand that disabled him from work for those days (and indicating the offer of additional permanent compensation). The document was relevant to General Counsel's contest of the accurary (sic) of Respondent's exhibit of claimed absences of employee Daly. Respondent claimed lack of knowledge, or of having received a copy of the report and challenged the authenticity of the document. It was agreed at conclusion of the trial that the parties would together or independently inquire of the New Jersey Manufacturers Insurance Company and stipulate if they could, after trial, to the authenticity of the document, upon which it would be admitted into evidence.

At pages 24 and 24A of General Counsel's brief, General Counsel has included a motion for admission of the document into evidence. Since it appears that the parties made independent investigations and orally agreed on the authenticity of the document, I admit GC-98 into evidence.

Appendix B

Findings of Fact

I. Jurisdiction

Respondent is a New Jersey corporation engaged in the business of labeling and decorating plastic containers. In (sic) maintains two plants, one in Clifton and one in Bloomfield, but the Clifton plant is the only facility involved in this proceeding.

In the year prior to issuance of the second amended complaint a representative period, Respondent provided and performed labeling and decorating services valued in excess of $50,000, of which services valued in excess of $50,000 were provided persons in states other than New Jersey.

As the parties admit, Respondent is an employer within the meaning of Section 2(2), (6) and (7) of the Act.

As the parties also admit, the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Unfair Labor Practices

A. *Respondent's Business Operations*

Based upon the testimony of Respondent's vice president of operations, Robert Tancredi, and several employees, such as Mike Roberts and Robert Linderoth, it appears that Respondent is a service company that labels and decorates plastic containers, usually under contract, for companies in the cosmetic, drug, or household products industries. These include companies such as Mennen, Colgate, Revlon, Helena Rubinstein, and the like.

Appendix B

Respondent's work is done under two alternate processes, each involving use of heat. One process is known as therimage, which is the application of a preprinted rotogravure label to a plastic container with the application of heat and pressure. As a result the label is laid on the exterior of the plastic bottle. An advantage of this process is that multiple colors can be applied in one pass on the machine.

The second process is called hot stamping, a method, again using heat and pressure, of impregnating the exterior of the plastic bottle with the label of the desired color, making the label and container almost homogenous. This process employs the use of a plastic type tape (mylar) coated with the desired color. In hot stamping, ordinarily only one color can be used in a single pass on the machine.

Loosely, both processes are referred to by employees and supervisors, as printing, or as decorating, as well as labeling.

Respondent has two plants, both engaged in the two processes, the older plant in Bloomfield, New Jersey. The other plant, which is the only plant directly involved in this case, is located in Clifton, New Jersey.

The Clifton plant, where Vice President Tancredi has his office and is the highest officer in charge, has four functions: a therimage department, a hot stamping department, a warehouse, and an office.

The therimage department ran three shifts round-the-clock, the hot stamping department ran only two shifts.

Employee Classifications

In both the therimage and hot stamping departments there are several classes of employees.

Appendix B

The feeder-packer-inspectors feed the plastic bottles onto the conveyor belts, inspect the bottles during the printing process, and pack the imprinted bottles into cartons for shipping.

The material handlers take the plain plastic bottles to the lines for the feeder-packer-inspectors and remove the cartons of printed bottles from the lines.

In the therimage department, but not in hot stamping, there are line attendants who tend to the rolls of labels put on the machine and remove and replace the expended rolls. They also watch for whether placement of labels on bottles is coming out right.

Both departments have line mechanics and setup men, who set the machines as job orders change and do needed mechanical repairs to the machines, in place on the floor. Usually, a line mechanic and setup man is one and the same person, but occasionally, said Vice President Tancredi, there will be a division of this work so that sometimes one will be doing setups and another mechanical repairs if it appears more efficient at the time.

In both departments there are quality control employees who take random samplings of the production work.

There is a plant engineer, and there are two machinists-maintenance mechanics who, unlike the line mechanics or setup men, work on the plant machines primarily off the floor. There is also a small group of building maintenance and repair employees, who are charged with keeping the premises, including the exterior and grass, in repair and clean.

The warehouse department employees are forklift operators, of whom there are about five.

Appendix B

The office department has five clerical employees.

Excluding the five clerical employees, and a half-dozen other employees whose status as either rank-and-file employees or as supervisory-managerial employees was in question, there were at least 118 plant bargaining unit employees in the week ending November 12, 1977, and at least 122 such employees in the week ending November 19, as the parties stipulated.

Supervisors

The agreed upon statutory supervisors, whose actions affected the events of this case, were Respondent's President Alfred (Al) Contreras, Sr.; Vice President (of operations) Robert Tancredi; Plant Manager Douglas (Doug) Contreras; Alfred (Al) Contreras, Jr., production control manager and office manager; John (Jack) Studt, supervisor of the thermiage department; Michael Bevilacqua, foreman thermiage department, first shift; Ed Alegre, foreman thermiage department, second shift; Robert J. Sanders, supervisor of the hot stamping department; Robert Tarantola, warehouse supervisor. Except for President Al Contreras, Sr., whose office was in the Bloomfield plant, all of these supervisors functioned on a daily basis at and for the Clifton plant.

Also mentioned in the testimony and not in contention, described by Vice President Tancredi as supervisors, were hot stamping department first shift foreman Neil Meador, and second shift foreman Eugene Thebodeau.

Respondent claimed that Robert Linderoth, second shift material handler of the thermiage department, Alice Gorski, line attendant or floor lady of the same shift and de-

partment, and Dorothy Saracco, handling quality control of first shift thermiage department, were also supervisors. General Counsel and the Union have contested this and say they are in bargaining unit employees.

Conversely, Respondent claimed that Stanley Newick, in charge of the plant building repair and of labels, and Leonard Bubrowski and Robert Rechsteiner, who were the two skilled machinists and maintenance mechanics engaged in principally off-the-floor work on the production machinery, were rank-and-file employees and part of the bargaining unit. On the other hand, General Counsel and the Union contend that these three were either supervisory or managerial employees who were not part of the bargaining unit.

These claims are considered *infra.*

B. *The Union Organizing Commences*

Employee interest in the Union in 1977 appeared to have begun with employee Bernard Daly, who was line mechanic-setup man on the second shift of the thermiage department.[4]

Employee Daly learned of the Union through an aunt, and as early as February 1977, he said, was in touch with Union organizer Joe Picola. Daly began talking about the Union to other employees in the shop.

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[4] The 1977 organizing was not a first attempt, according to Respondent's President Al Contreras, Sr. There had been previous attempts, he said, and he was constantly vigilant and had been successful in keeping the Union out.

Appendix B

Daly further testified that he had a conversation with Foreman Mike Bevilacqua of the first shift thermiage department (not Daly's supervisor), who told him in a friendly manner, said Daly, that he could get fired for talking for the Union. As a result, said Daly, he stopped talking about the Union for a considerable period of time.[5] Employee Eleanor Ott, who carpooled with Daly and whom Daly interested in the Union, testified that he told her in February that someone in management had told him if he didn't stop talking Union he could be fired.[6]

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[5] Employee Daly conceded that he had been told the same thing by employee Mike Carbone, but didn't refer to the Bevilacqua conversation in his affidavits to the Board in November after being fired by Respondent, or again in December (after the firing had been commuted to a two week suspension), because immediately after the firing Bevilacqua had indicated he wanted to get Daly back to work for him on the first shift, and, said Daly, he didn't want to make trouble for Bevilacqua.

Foreman Bevilacqua denied the February talk or any other talk with Daly about the Union, but Bevilacqua proved to be an unreliable, self-contradictory witness. For example, Bevilacqua, a former official of a union, claimed he knew never to question or harass an employee about a union and said he never did about this Union. However, employee Maria Garcia testified that after she signed a Union card given to her by co-worker Zenaida Esquilin from quality control girl Dorothy Saracco and, clutching the card in her hand, went looking for Saracco to turn the card in, Foreman Bevilacqua asked her who had given her the card and she told him, truthfully, Zenaida from Dorothy Saracco. Other problems with Bevilacqua's credibility are dealt with *infra*.

[6] Employee Ott's credibility was not challenged, indeed she was complimented by President Al Contreras, Sr. on her honesty in testifying.

Appendix B

In early September 1977, employee Daly was called by Union organizer Tom Acosta. Employee Mike Roberts, who had responded to a Union leaflet left in the plant cafeteria in July was also called. The two employees met with Union organizer Acosta in a diner and, after comparing plant and Union benefits, decided on the desirability of achieving Union representation in the shop. Daly testified that he began talking to employees both in the shop where, as a line mechanic, he got around, and before work hours. He recruited, among others, employees Eleanor Ott, feeder-packer-inspector on the second shift, Dorothy Saracco, quality control on the first shift, and Elton Demonteverde, line mechanic on the second shift. Ott and Roberts also talked to fellow employees and by mid-October the Union began holding meetings with employees at a nearby Howard Johnson Motel in Clifton, under chairmanship of Union organizer Acosta. There were approximately three or four such meetings in October and meetings continued to be held in November-December. A goodly part of the card signing, and paying of Union dues of $10, was done at these meetings. Employees, such as Daly, Ott, Linderoth, signed Union authorization cards at a Union meeting on October 19. The October 30 meeting, where employee Roberts signed his card, was attended by about 40 employees, according to Roberts.

By November 1, 29 employees had signed Union authorization cards, and a Union organizing committee among the employees had been formed.

Appendix B

C. *Respondent's Counter Campaign*

Interrogation

During the latter part of October 1977, Foreman Bevilacqua investigated the rumors he had heard about unionizing. He interrogated employee Daly twice. On the first occasion he asked Daly if he knew anything about a union starting. Daly said no. On the second occasion, Bevilacqua asked Daly if he knew anything about the Filipino employees starting a union in the plant. Daly denied any knowledge.[7]

Discharge of Employees Daly and Ott

In this period Daly was separated from his wife and had the care of a young son who was ill and for whom he received some help from his aunt. On October 31 and again on November 1, Daly reported to his shift on time at 4 p.m. but asked for and received permision from his foreman, Ed Alegre (in the presence and with the assent of Plant Manager Doug Contreras on November 1) to leave early to tend to his sick son. On the morning of November 2, well before he was due at the plant, Daly was called at home by Foreman Al Alegre who said he had been instructed by the company to notify Daly that his services were no longer needed.

In distress, employee Daly went to the plant for an explanation. Plant Manager Doug Contreras told Daly he

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[7] I do not credit Foreman Bevilacqua's denials of inquiring of employee Daly on these subjects, for reasons noted *supra* and *infra*.

had been absent too much and that Respondent was cracking down on absentees because the company was losing too much money, giving as an example the failure of two women to show up the previous night on the third shift that cost the company $300 to $400. Contreras claimed that Daly didn't contest the allegation that he was absent too much. On his way out of the plant, Daly was stopped by Foreman Bevilacqua who on learning that Daly had been discharged told him he would try to have him rehired on his shift because business was picking up and he could use another mechanic. Daly had never received any discipline or warnings during his employment, and had received a pay raise with praise for his work by Foreman Alegre in mid-August 1977.

Just before midnight of the prior day November 1 when the second shift ended, employee Eleanor Ott had been called in by her supervisor, Foreman Ed Alegre, and told, in the presence of hot stamping Foreman Eugene Thebodeau, that she was discharged because of her absences from work. Her most recent absence had been a day in the previous week and there had been no warning or discipline given her. There was no review of her record of absences by Forman Alegre; and Alegre, though still in Respondent's employ at the time of trial, did not testify. At trial, the alleged record of her absences, as well as the alleged record of Daly's absences, were overstated and inaccurate.[8]

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[8] Respondent's Exhibit R-27 for identification, which was placed in the rejected file because of its inaccuracies relating to Bernard Daly and Eleanor Ott, failed, among other things, to identify which of the "absent" days were vacations days for Daly and

(Footnote continued on following page)

Appendix B

Respondent's Meetings with Employees

On November 4, two days after the discharge of Daly and Ott, Respondent's Vice President Tancredi called each of the three shifts to meet with him, separately, in the plant cafeteria. According to Tancredi, each employee was handed a paper labeled "Agenda for General Meeting" (Respondent's Exhibit, R-11) as he or she came into the cafeteria. Though it was in the form of an outline, Tancredi claimed that he read the paper to each of the three assemblages of employees, prefacing what he read by saying he would take no questions but would remain after he finished, and talk with any employee who came forward with any problems.

In the paper, as Tancredi said he delivered it, the employees were told that Respondent neither wanted nor needed the Union, that employees had the right to refrain from joining the Union, that the Union would out promise the employer but guarantee nothing other than that the employees would pay monthly dues, that job security could be obtained only from the company, that unionized plants sometimes became uncompetitive and find it difficult to stay in business and that it was important for job security to maintain the current level of business, and, finally that the company's growth in business and jobs had been accomplished heretofore without outside interference.

(Footnote continued from preceding page)

Ott; and in Daly's case, while recognizing that several "absent" days in April 1977 were for disability from injury on the job, indicated all of the March 1977 "absences" as unexplained absences, when they were in fact part of the whole job-related disability absence that began March 8 and ended April 18, see exhibit GC-98, the workmen's compensation record of Respondent's insurance company.

Appendix B

In Tancredi's meeting with the second shift employees, employee Roberts rose after Tancredi gave his speech, and asked to read a petition to Respondent from the second shift employees of the therimage department. Tancredi asked if it dealt with the Union matter of which he had just spoken, and Roberts replied that it was an employee petition, whereupon Tancredi told him to read it. Roberts read the petition, signed by approximately 30 employees, stating that they felt the firing of employees Bernard Daly and Eleanor Ott was unjust, and that both should be rehired. Roberts handed the petition (Respondent's Exhibit R-12) to Tancredi, who said he would consider it and get back with an answer.

Soliciting Grievances

Thereupon, according to employee Roberts, Vice President Tancredi adjourned the meeting stating that he and Plant Manager Doug Contreras would stay on to talk with anyone who had problems and not to hesitate to come forward with them. Employee Christine Grus testified that Tancredi said he hadn't realized there were so many problems in the company and asked any who had problems to stay and discuss them, or come to the office and discuss them. Employees Grus and Helen Berry accepted Tancredi's invitation at the close of the second shift and talked to him in the cafeteria.

Employee Grus told Vice President Tancredi that a lot of women had complaints including complaints of being harassed by foreman. According to Grus, Tancredi asked her to make a list of the complaints and give it to him. (Tancredi claimed he said he would be willing to talk to the employees and maybe it would be helpful to have

a list of grievances to discuss.) Grus replied she would talk to the other employees.

Two days later said employee Grus, Plant Manager Doug Contreras came to her asking for the list. Contreras testified that Tancredi had told him of the conversation with Grus. She asked employee Mike Roberts to explain why she didn't have the list. Roberts told Contreras that, if Respondent was ready to recognize the Union, a bargaining committee would go over the grievances. Contreras answered that he didn't recognize the Union.

Promising Benefits

Employee Helen Berry who started to talk to Vice President Tancredi after the November 4 meeting in the cafeteria ended up talking to the therimage department supervisor Jack Studt who intervened in the conversation. According to Studt, Berry complained of Foreman Alegre making the second shift women employees cry, and asked questions about obtaining Blue Cross-Blue Shield benefits. Studt testified he asked Berry why the employees never informed management of the problems, and told her that most of the problems could be straightened out. Employee Elton Demonteverde, a second shift line mechanic, testified without contradiction, that in a conversation with Studt on the production floor, before the election, Studt told him he had been getting employee complaints about pay, but the company was growing, and if the employees gave the company a year, it would straighten out the problems.

Appendix B

Reinstatement of Daly and Ott

On November 9, the Union filed, and served copy on Respondent of, the initial unfair labor practice charge (in CA-8027) alleging the unlawful discharge of employees Daly and Ott. On November 15, Respondent called Daly and Ott to the office and offered them reinstatement. Both accepted and started work the next day, November 16. Respondent treated the prior two weeks as a justified suspension, gave no backpay for the loss of wages, and posted a notice to that effect (Respondent Exhibit R-13). However, Vice President Tancredi testified that he had reviewed attendance records of other employees and found many others with many absences against whom similar action had not been taken.[9] Additionally, there was no evidence that the two employees, who allegedly cost Respondent $300-$400 by not showing up the night before Daly was discharged, were either fired or suspended.

Union Recognition Requested and Refused

On November 11, Union organizer Tom Acosta, accompanied by some of the members of the in-plant organizing committee[10] met with Plant Manager Doug Contreras.

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[9] In a later conversation between employee Ott and President Al Contreras, Sr. Ott told him she had been unjustly fired, and he agreed, saying that the company had gone through the employee records and found that there were many others absent many times, and that she had been called back when the mistake was realized.

[10] Among those of the organizing committee who accompanied Acosta were employees Mike Roberts, Robert Linderoth, Alice Gorski, Dorothy Saracco, Christine Grus, Rudy Gonzalez, Rich Sklepko, Arthur Hauser, and Drew Struss or Straus.

Acosta said that a majority of the employees had designated the Union as their representative, and requested recognition by Respondent. At the time the Union had 67 signed authorization cards (well over a majority). Contreras replied that he didn't recognize the committee or the Union as representative of the employees. The Union filed a representation petition with the Board on November 14 (case RC-7335).

Enforcing No Solicitation Rule

On November 18, employee Dorothy Saracco, quality control girl on the first shift of the therimage department, and a member of the employees' in-plant organizing committee, was asked for a Union authorization card by employee Zenaida Esquilin for Esquilin's co-worker Maria Garcia, who had just returned to work after pregnancy leave. The reqeust for the card was made and the card handed to Esquilin at lunch break on the therimage production floor. Saracco testified that while many employees used the cafeteria for lunch break others remained on the production floor. Before lunch break ended, Esquilin returned the card signed by Garcia to Saracco.

Employee Maria Garcia testified that when she received and signed the card Zenaida Esquilin told her to give it to Dorothy Saracco. Maria, holding the card, went looking for Saracco but met Foreman Bevilacqua. According to Maria and Bevilacqua's admission, he asked Maria who gave her the card and she answered, Zenaida from Dotty. Maria then gave the signed card to Zenaida who turned it over to Saracco.

Following the lunch break, Foreman Bevilacqua called Saracco into his office and, in the presence of employee

Appendix B

Ralph Vargas whom Bevilacqua told her was there as a witness, gave her a warning not to pass out Union cards anymore on company time as she had done with Maria Garcia, and, that while she might talk on break time or lunch time, she was not to pass out Union cards or Union literature on the production floor or in the parking lot because it was private property.[11] When employee Saracco asked Foreman Bevilacqua that the warning be put in writing, Bevilacqua went to the plant manager's office, and came back telling Saracco that the company lawyer said he was not to put anything in writing.

Interfering With Distribution of Union Literature

In the early morning of November 29, at about 7 a.m., employee Mike Roberts (a second shift employee) and several other employees and Union organizer Acosta, sta-

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[11] Foreman Bevilacqua claimed that he told employee Saracco, only, that while she was working she was not to hand out Union literature. Bevilacqua shifted his testimony too much to be a credible witness. He first said it was merely a friendly conversation with Saracco not a warning. Ultimately he conceded that it was a warning for Saracco, who, he said, had done something she wasn't supposed to do under plant rules that he didn't bother to read or cite to her. He was asked, since he had adopted Respondent's view that Saracco was a supervisor, why he had not waited for therimage department Supervisor Studt to return from lunch and have him present for the warning rather than rank-and-file employee Vargas. Bevilacqua first responded that he didn't need or try to get Studt or *anyone else in management*, since he (Bevilacqua) was a foreman and didn't need back up for what he had to do for himself. However, as his cross-examination progressed, Bevilacqua admitted that before calling Saracco in for the warning he had consulted with Plant Manager Douglas Contreras, telling Contreras that Marie Vargas told him (Bevilacqua) that Saracco gave her a Union card, and asked Contreras what should he do.

tioned themselves outside the plant in order to distribute Union literature to third shift employees who would be leaving the plant and the first shift employees entering the plant. While Acosta and the other employees took up positions on the sidewalk at the front of the building, employee Roberts took his position at an employee entranceway located at the rear and side of the building near an employee parking area. Employees approached the building entranceway on foot after parking their cars, and reversed the process on leaving the building. A few feet beyond this building entranceway was the loading platform used by trucks for loading and unloading. Both the building entranceway and loading platform were on a large L-shaped indentation of the building, which area was accessible to and from the public street (Bloomfield Avenue) and sidewalk by a wide two-lane driveway used by trucks and cars and by employees on foot.

Employee Roberts testified that he took up his position at the rear employee entranceway at approximately 7:10 a.m. and left about 7:30 a.m. It was not disputed that he was within the indentation of the building and not in the driveway and not in the area in front of the loading platform. No truck came by him in the 20 minute interval of his stay, said Roberts.

The supervisor of the hot stamping department, Robert Sanders, parked his car that morning on the Bloomfield Avenue (front) side of the building, observed Acosta and the several employees on the sidewalk distributing Union literature, walked up the driveway from the street, and confronted employee Roberts in his position at the building indentation facing the employee entranceway. According to Sanders, Roberts was accosting employees walking from the parking lot to the building entranceway to

hand them Union literature (the night shift employees, said Sanders, had not yet emerged from the building).

As both men testified, Supervisor Sanders told employee Roberts he was on company property and could not distribute Union literature on company property, and to move to the public sidewalk where his fellows and (Union organizer) Acosta were handing out Union literature. Roberts responded he was not on working time and had a legal right to distribute the literature at a place such as this outside the working area of the plant. Sanders warned Roberts that if he did not comply with the order to move off the property he would be subject to disciplinary action.[12]

Following employee Roberts' initial refusal to desist from distribution of the Union literature, Supervisor Sanders went into the building and fetched warehouse Superivsor Tarantola as a witness to Roberts' refusal to desist. Roberts again refused to move and Sanders again threatened disciplinary action. Roberts testified that he stopped the leaflet distribution there and did not engage in Union leafletting in this area again; and there was no disciplinary action taken against him.

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[12] Supervisor Sanders claimed he also said to employee Roberts it was a busy area where trucks and cars came in and out and he should not be there stopping the people on foot. Roberts denied there was any such reference to danger from trucks and cars or other safety hazard. In view of the fact that Roberts was not in the driveway, or in the truck loading area, and Sanders admission that employees as well as he have used the wide driveway to get to the entranceway without problems, along with Sanders' expressed personal belief that Roberts should not have been distributing Union literature on company property, I view the claimed reference to an alleged safety hazard as an afterthought.

Employee Roberts further testified that he had never seen or heard of any such or similar company prohibition against soliciting or distribution. On the contrary, said Roberts, he had seen soliciting and distribution of materials on the plant floor during working hours, in connection with raising church funds or selling for Avon, which involved distribution of raffle tickets, chocolate bars, and Avon products. These activities had been carried on, said Roberts in the sight of, and with the knowledge of, Foreman Ed Alegre of the second shift, on which Roberts worked.

Suspension for Attending Board Proceedings

In the afternoon of November 29 an informal conference for dealing with the Union's representation petition had been scheduled for 1:30 p.m. at the NLRB office in Newark, New Jersey. Present for Respondent were Vice President Tancredi and lawyer Pachman, and for the Union organizer Acosta and lawyer Flynn, accompanied by employees Linderoth, Ott, and Roberts of the second shift thermiage department.

The starting time of work for the three employees was 4 p.m. In mid-afternoon, recognizing that the conference might continue longer and past their 4 p.m. shift starting time, the three employees agreed that employee Roberts should call the plant and report that they might be late for the shift start. Roberts testified that he made his call at about 3:30 p.m., at a point when it looked like they would no longer be involved in the business of the meeting and could arrive at the plant five or ten minutes late. On the phone, Roberts gave his message first to the receptionist but ended up talking to the hot stamping depart-

ment supervisor Robert Sanders, the man who had threatened Roberts with discipline, earlier that day, if he persisted in distributing Union literature at the employee plant entranceway located on Respondent's premises. (Supervisor Sanders explained that he took or was given the call because he was temporarily acting for the thermiage department supervisor Studt, who was out.) Roberts identified for Sanders the three who would be late, where they were, and the approximate time of arrival.

Employee Roberts testified that Sanders told him the company had instituted a policy that if an employee did not start the shift on time he would not be permitted to work that day, that the three employees should not bother coming to work and should consider themselves suspended for the day, but would be permited to resume work the next day. Sanders admitted telling Roberts that the three employees should not come in, without conceding that he referred to a "policy," but testified that the decision was Plant Manager Doug Contreras' decision. Normally, said Sanders, he would handle the matter by himself, but since he was substituting that day in the thermiage department for Supervisor Studt and didn't know how the lateness would affect production, he checked with the plant manager, Contreras. However, Sanders admitted that he did not check with the shift supervisor, Foreman Alegre, who would directly know the effect.

Upon being told not to come in, employee Roberts informed his two co-workers; and being in the Board's offices, all three went to the Board lawyers to complain of discriminatory conduct against the three of them, since Respondent's practice as they knew it had been to permit employees who notified the plant of delay in arrival to come in as soon as they could. Supervisor Sanders ad-

mitted in his testimony that such was the plant policy, though he claimed Roberts' call was after 4 p.m. Both employees Linderoth and Ott testified that Roberts had made the call at least a half-hour before 4 p.m.

The fact is that about a half-hour before 4 p.m., Plant Manager Doug Contreras knew from Vice President Tancredi that three employees sitting in the Board conference room with Tancredi would probably be late for the start of the 4 p.m. shift. Tancredi testified that he became so concerned that the three employees would not get to work on time that he interrupted the conference (without explaining his reason, or talking to any of the three employees) to telephone Plant Manager Contreras that he saw no way how three employees attending the conference could get to work on time, and requested Contreras to get employees of the first shift to stay over and take their places. Contreras testified that he asked first shift Foreman Bevilacqua to make the arrangement (which he described as getting some first shift employees to double-shift), and when Supervisor Sanders told him (Contreras) at about 4:15 p.m. that employee Roberts was on the telephone, told Sanders to tell Roberts that he and his companions were not to come in. Contreras said he told Sanders that coverage arrangements had been made and there was a lack of courtesy by the three employees in not calling in beforehand.

Respondent's testimony comprising and surrounding this explanation had an artificial ring. Vice President Tancredi backed off from his initial explanation that he called Plant Manager Contreras out of concern that the employees had not called in and the need for proper shift coverage, to suggest that he called Contreras merely to ask for any messages for himself or any problems need-

ing his attention, and threw in the presence of the three employees at the conference as a "by the way" comment—indeed he wasn't even thinking of them when he placed the call, he said. Further Tancredi could not explain why, instead of interrupting the meeting to place the call, he did not put his concern for plant coverage to rest by asking any one or all of the employees if they had remembered to notify the plant. In this regard his testimony was further suspect because at the meeting Tancredi had initiated the position that, along with several other employees, Linderoth was a supervisor, but had not inquired of Linderoth whether he had arranged with the plant to be away because, said Tancredi, he didn't want to indicate harassment of Linderoth. Yet, despite this alleged intention not to harass Linderoth, said Tancredi, he was not outraged or embarrassed by Plant Manager Contreras' suspension of Linderoth for a day, which Tancredi claimed he didn't discuss beforehand with Contreras, and which he did not revoke when he learned of it. All three employees lost a day's pay.

Tancredi testified that he recalled other experiences of suspending employees who called in within minutes after the start of their shifts. He and Respondents were given ample opportunity to present any documentation to support the claim but came up with two irrelevant records, one of employee Thomas Stasio, shown only to have quit voluntarily, and the other of employee Omar Gonzales, with no indication of why he was terminated (see testimony of production control manager and office manager, Alfred Contreras, Jr.).

Plant Manager Doug Contreras testified that he didn't recall that Vice President Tancredi identified the three second shift employees who would be late on November 29,

yet, he said he made arrangement with first shift Foreman Bevilacqua to hold over first shift employees to cover for them. Foreman Bevilacqua testified that Contreras asked him for three employees and all of his people had left but two, whom he had held over for cleanup, and they agreed to work the second shift that night, a Tuesday. The two were employees Reynaldo DeGuzman and Nicasio Manasala, but their timecard records (Exhibits R-32 and R-33) disclosed that both men worked doubleshift the whole week starting a day earlier, Monday, running through Friday, putting in 86 and 81 hours respectively (the 86 hours reflected some additional daytime hours on Saturday).

Instructions to Cease Support of Union

Some days after the representation conference of November 29, in the week of December 6, according to Plant Manager Douglas Contreras, he held a meeting in his office of the plant department and shift supervisors to which he summoned employees Robert Linderoth, Alice Gorski, and Dorothy Saracco. Vice President Tancredi testified he was aware of the meeting and its purpose. The department and shift supervisors present were Supervisor Studt and Foreman Bevilacqua of the thermiage department (but not Foreman Alegre), and Supervisor Sanders and Foreman Meador and Thebodeau of the hot stamping department, and possibly Supervisor Tarantola of the warehouse department (according to Sanders).

The meeting was directed specifically to employees Linderoth, Gorski, and Saracco, and, for their benefit, Plant Manager Contreras read to them, from a book, the National Labor Relations Act definition of a supervisor. Con-

treras then told them, as all three employees testified, that Respondent considered each of them to be a supervisor; that, as supervisors, it was unlawful for them to engage in Union activity; and, if they did, the Respondent had the right to take action against them. Linderoth asked if this was a threat that they would be fired if they were involved in Union activity. While Contreras gave a surface "no" answer, he supplied his real answer by pointing out that if he, the plant manager, wore a Union button or distributed Union literature, the company could take action against him, that it was so written in the book, and if they didn't believe him they should ask a lawyer. Gorski, Linderoth, and Saracco each testified that they came away from the meeting understanding that they were in jeopardy of being fired if they had anything more to do with the Union.

Although Linderoth had worked for Respondent about two years, and Saracco about five years, and Gorski about eight years, each noted that this was the first time that anyone had suggested that he or she was a supervisor for Respondent; and Vice President Tancredi agreed that it was not until this meeting in December 1977 that the three employees were informed that Respondent regarded them as hourly paid supervisors or assistant supervisors. To the contrary, employees who worked with them testified that they had never regarded any of the three as supervisors. Thus, second shift employees such as Lucille Frederickson, Stefania Zaborniak, Helen Berry, Arthur Hauser, and Peter Hatala, who had received Union cards from Linderoth, testified that they did not know or believe Linderoth to be their superivsor or anyone's supervisor, but knew him as just another worker, and that they did not feel threatened when they received from him, and signed,

their Union cards. Christine Grus, also a second shift worker, who got her card from Union organizer Acosta, testified that Linderoth was not her supervisor or anyone's supervisor or a representative of management. Employee Maria Garcia, first shift worker who received her Union card indirectly, through another employee, from Dorothy Saracco, testified that she didn't consider Saracco as a boss or her boss but simply an employee who had been at the plant for a time and knew the rules. Employee Eleanor Ott, a second shift worker, testified that she did not know or regard Alice Gorski as a supervisor but as a senior employee who knew more about what was going on in the plant than others knew.

Employees Linderoth, Saracco, and Gorski each testified that the meeting in the week of December 6, 1977, conducted by Plant Manager Contreras, was the first supervisors' meeting each of them had attended. Thermiage department Supervisor Studt confirmed that before this meeting there had never been a supervisors meeting at which these three employees were present, and that this meeting was the only meeting of so-called hourly supervisors ever held. Additionally, Linderoth testified that he had never been in the plant manager's office before (or that he had ever been in Vice President Tancredi's office).

Soliciting Grievances

In the week of November 25, according to Vice President Tancredi, he sought out employee Dorothy Saracco as she worked at the line. He testified that he knew she was part of the Union organizing committee. He talked with her of some quality problems and then turned the conversation to the Union. He said he was surprised and

shocked by the Union organizing, because in the past employees had talked to their supervisors and management regarding problems. Saracco testified that he then told her to go to the employees and tell them to come to him with their problems. Saracco replied that the employees now had an organizing committee and he could deal with them on problems.

Antiunion Campaign Intensified

In December 1977, Respondent intensified its antiunion campaign in the plant, including the distribution and posting of antiunion literature (examples are contained in Respondent's Exhibit R-24).

President Al Contreras, Sr., who was headquartered in the Bloomfield plant and did not normally spend much time at the Clifton plant, turned his full attention and time to the Clifton plant employees. He testified that he had between four and five hundred individual conversations with the Clifton plant employees on the subject of the Union, talking to approximately 120 to 130 employees between one and five times each, usually on the plant floor as they worked, he said. In each talk, said Contreras, after introductions and pleasantries, he made clear that Respondent opposed the Union and that the employees didn't need the Union. In the specific conversations, however it turned out that he went further.

Interrogation, Soliciting Grievances, Threats

President Contreras talked to employee Saracco, about December 10. He observed she was wearing a Union but-

ton and asked why she was for the Union, and would she tell him her problems with the company. Saracco replied that she was underpaid and that the company did not provide sick days for employees. He said he couldn't make any promises then, but now that he knew of the complaints, the company would be a better place to work. However, he said, the company was not in a position to support a union and he was not going to support a bunch of organizers. And, if Mennen (the largest customer of Respondent) took away 40% of the company's business, production would slow down and employees would be laid off. He added that he hoped she would be on his side and help defeat the Union and he would see that the place became a better place to work now that he was aware of her problems.

President Contreras denied referring to Mennen or to possible adverse reaction from Mennen if Respondent became unionized, then changed his testimony to indicate he didn't remember the conversation but was testifying from speculation, saying, if Mennen was mentioned it was with regard to qaulity (sic) or quality control, since his lawyer had told him never to say anything about losing business because a union was trying to organize the company. Contreras forgot, of course, the prepared speech he gave that same month to all of the assembled employees (exhibit GC-2 discussed infra) in which he described how unionization could cost Respondent half of the business it received from Mennen.[13]

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[13] This explanation by President Al Contreras Sr. of his conversation with employee Saracco was typical of his testimony in which he was evasive, and had no independent recollection of his conversations with the employees (which was not surprising in view of the many hundreds of conversations he had). He was not a credible witness.

Appendix B

Soliciting Grievances

President Contreras had several conversations with employee Christine Grus in December 1977. In the first conversation he asked her if she had any complaints against the company. She told him of harassment by Foreman Ed Alegre.

Threats of Reprisals

In another conversation, according to employee Grus, President Contreras told her that, if the Union came in, customer companies, like Colgate, Mennen, and Proctor and Gamble, would not renew their contracts with Respondent because they were afraid of strikes, and as a result a lot of Respondent's employees would be laid off.[14] Grus testified that she discussed this aspect of President Contreras' convensations with other employees, naming three, and told them that Contreras wanted them to vote against the Union and get others to do so.[15]

Employee Christine Iwanicki (a cousin of employee Grus) testified that in a conversation with President Contreras three weeks before the election, he told her that the Union would be bad for the company, that it would

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[14] Significantly, President Contreras, having listened to Grus testify and having reviewed the transcript of her testimony (as he did in the case of all of the employee witnesses), did not deny having made this statement.

[15] This latter also refers to a request made to employee Grus and employee Christine Iwanicki by President Contreras, covered *infra*.

ruin him, that he didn't want the Union and would do his best to stop it, and she should think about that. Further, he said, a lot of customer companies might not want to sign contracts with Respondent if the Union came in because they feared strikes and preferred to deal with non-union companies; if the Union came in employees would lose jobs and she might be one of them; moreover, if the Union came in he would sit back and no longer care about the company because it would not grow. Contreras denied talking to Iwanicki of loss of company contracts or employee jobs, but I do not credit his denial.

Coercion to Induce Other Employees to Cease Union Support

Several days before the election, President Contreras went to both employees Grus and Iwanicki (both with reputations as talkers and being well liked by the employees) and, as Grus testified, asked them both to use the influence they had with fellow workers to persuade them to vote no, against the Union. Grus testified that she told this to several employees (naming three), along with Contreras' statement that there might be layoffs if the Union came in. I do not credit Contreras' denial that he asked this.

Promising Benefits

In a prior conversation with employee Grus in mid-December, President Contreras asked her if she was going to school. She said she was going to a computer school, learning to be a computer technician, and that a friend

had indicated he might be able to get her a job at IBM. According to Grus, Contreras said, why there, why not with Permanent Label, which would grow and expand, if the Union did not come in, and would be needing and using computers, and why shouldn't she grow with the company rather than look for work elsewhere. Grus testified that Respondent did not have a computer operator's job and that Contreras said he was not making her a promise because it would be against the Labor Board regulations.

Union Insignia

In the course of the conversation, Contreras observed that Grus was wearing a Union button, and according to Grus, he asked her to take it off. She testified that this could have been a direct order, but she answered no and laughed and did not remove the button. Contreras claimed what he said was intended as a joke, but Grus testified she didn't think it was a joke.

Interrogation, Promising Benefits, Threats

President Contreras had two conversations with employee Linderoth. He asked Linderoth why he was wearing a Union button. Linderoth responded that the employees needed representation, the company had not treated them properly. On his part, Contreras replied that the company didn't need and the employee's didn't need a Union, that he knew things were wrong in the plant, but now that he was there, and knew the things that were wrong, the plant would get better.

Appendix B

In the second conversation, President Contreras told employee Linderoth that Respondent was going to diversify and do more than just label bottles, that the plant would be bigger and need more supervisors, but if the Union came in the expansion would slow down. He told Linderoth that he was financially well-off (well-heeled was the expression used), and if the Union came in he was not going to work as hard for the business as he had worked. According to Linderoth, Contreras said, if the Union came in, it would tie him up with grievances, and he pointed out that unions had closed down some companies.[16]

Promising Benefits

President Contreras engaged employee (Mia) Mehmeti in conversation in December 1977, before the election. He asked her if she was going to school and, when she said no, asked why. Mia said she had to support her mother and could not afford school, but that maybe some day she might be able to go. Contreras told her he thought she was too young to work in a place like this, and asked her what she wanted to be. She answered, a nurse. According to Mia,

[16] There was no contradiction of Linderoth's testimony by President Contreras. When asked, considering that Linderoth was a supervisor, as Respondent has contended, why he hadn't asked Linderoth to remove the Union button he was wearing, Contreras said he didn't know that Linderoth was a supervisor; that he talked with Linderoth at his job, while he was feeding bottles into a hopper or sealing a container. He also testified that he didn't know that employees Dorothy Saracco and Alice Gorski were also (supposedly) supervisors when he talked to them; indeed, said Contreras, he had never seen any of the three at supervisors' meetings.

Contreras said he would go into the office and check to see if there was anything he could do for her and would get back to her. Mia testified she understood he was promising her assistance by helping to pay for her schooling, but he never returned. Contreras testified that he told her she should pursue education in a nursing career but did not promise her any help.

Interrogation, Union Insignia

Before their conversation ended, Contreras commented on Mia wearing a Union button. Employee Robert Linderoth, who was present during this part of the conversation, testified that Contreras asked Mia why she wore the Union button, and that she replied, because she believed in what the Union stood for. Contreras then said, as both Mia and Linderoth testified, that he wished he had a big company button saying "No" that she would wear in place of the Union button. Mia answered that she preferred to wear the Union button, it matched her green blouse. Contreras admitted the statement, but claimed that it was a form of joking.

Soliciting Grievances, Promsing Benefits

Employee Helen Berry testified that in President Contreras' floor conversation with her, she discussed employee problems and that he said to her, now that he knows about them, give the company a chance, one year from January to January, and they would straighten things out. He further told Berry, she said, that if she had any problems to come to him any time, if he was not in the Clifton office, to reach him at the Bloomfield office. Contreras testified

that he didn't remember the problems employee Berry raised, but that he didn't promise to straighten them out in a year, and that he told her that she and anybody at the Clifton plant could call him at the Bloomfield office. I credit Berry's testimony.

Interrogation, Promising Benefits

Employee Eleanor Ott testified that, in the first of President Contreras' floor conversations with her, she was wearing a Union button, and he asked her why she felt she and the other employees needed a Union. Ott answered, there were problems, such as an absence of medical benefits including her own lack of such coverage.[17] Contreras told her the company had a Blue Cross-Blue Shield program of insurance for which she was eligible. She answered this was the first she knew of it and thought that employees should be informed beforehand. He offered to see that she got the necessary forms and jotted down a reminder for himself. Two days later Vice President Tancredi who had also talked to employee Daly about his Blue Cross coverage, asked if other employees needed it, and learned that Ott had no coverage, came to Ott on the plant floor asking if he could help with her medical insurance problem. He handed her medical plan cards to complete, which she did, returning the completed forms to him the following day. Tancredi conceded that responsibility for handling medical insurance matters is assigned to Barbara Engel of the clerical staff and that

[17] She also referred to her unjust firing on November 2, which he said to her was corrected by calling her back on November 16, see note 9, *supra*.

soliciting for Blue Cross-Blue Shield was "out of channels" for him. The company handbook indicates that a current employee not enrolled in the medical plan may not enter the program (under which the company shares the Blue Cross-Blue Shield cost with the employee) except during open enrollment days of February 25 and August 25 each year on application to be made one month in advance (General Counsel's exhibit GC-4, at 9C). The solicitations here were in December.

In a second conversation with employee Ott, President Contreras told her he saw no reason for a Union to resolve her problems, that the Union could make promises or benefits but only he could deliver on promises.

Interrogation, Soliciting Grivances

Therimage department supervisor Jack Studt, who said he was opposed to the Union coming into the plant, testified that, though he had been briefed not to inquire of employees about the Union, he talked in December 1977 with 90 percent of the employees on the several shifts in his department—about 80 employees—asking them individually why they thought they needed a Union and if they had any major problems or grievances.[18]

[18] This testimony was elicited in cross-examination of Supervisor Studt. In the brief of General Counsel, motion was made (page 35, note 16) to amend the complaint to allege additional violations by Respondent of Section 8(a)(1) of the Act, comprising the interrogation of employees and solicitations of grievances from them by Supervisor Studt. While Respondent has not objected to grant of the motion, I believe it and the proposed amendment of the complaint are unnecessary, since the evidence of such violations, relating to similar and contemporaneous violations alleged in the complaint, has been adduced and litigated, and I am obliged to decide the issue regardless of whether it has been specifically pleaded. *Monroe Feed Store,* 112 NLRB 1336, 1337 (1955).

Appendix B

Grant of Benefits—Year End Bonuses

About a week before the election of December 30, 1977, Respondent paid year end bonuses to all employees. Except for a very few employees with special skills or status who were given a greater amount on determination by Vice President Tancredi and Plant Manager Contreras, the employees were each given the equivalent of one week's pay if they had one or more years of service, and a prorated portion of one week's pay if they had less than a year of service.

The payment of a bonus to employees with less than one year's service was a deviation from the announced and posted policy of Respondent of January 26, 1977, stating that to be eligible for a 1977 year end bonus the employee had to be on the payroll as of December 31, 1976 (General Counsel's exhibit GC-6). Likewise such payments deviated from the bonus paid for the prior year at the end of December 1976, from which Respondent excluded all employees with less than six months' service.

In 1975 and prior years, according to Vice President Tancredi, Respondent's year end bonus policy had been to give the equivalent of one week's pay to all production and maintenance employees with over one year's service and a prorated portion of one week's pay for those with less than a year's service.[19] However, said Tancredi, in mid-December 1976, Respondent decided that it needed to conserve cash for the expense of a hoped for move in 1977

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[19] The employees with special skills or status were given special consideration and paid more than the equivalent of a week's pay, according to Tancredi.

of its two plants into one building in Saddlebrook, New Jersey. Tancredi testified, that, without notifying the employees of either the contemplated plant move or the change in bonus policy, in the December 1976 bonus Respondent eliminated any bonus for employees who had not been on the payroll at least six months at the end of 1976. This action was followed by another bonus policy change, one month later on January 26, 1977, when Respondent posted a notice (exhibit GC-6) informing employees that, to be eligible for the December 1977 bonus, employees would have to be on the payroll since December 31, 1976. The purpose, though not told to the employees, said Tancredi, was to further increase the cash reserve for the plant move.

The deal for the Saddlebrook plant fell through in March 1977, according to Vice President Tancredi; nevertheless, believing that consolidation of the two plants was in its interest, Respondent continued search and negotiations for another plant location. Tancredi claimed that the last negotiation for a new plant (a so-called Berkey deal) came to an end in September 1977. However, Respondent's financial report for the third quarter of 1977, dated September 30, 1977, shows that the accrued moving expense (then over $65,000) "represents three quarters of the estimated cost of moving the company's plant in the latter part of 1977" (Respondent's exhibit R-20, note 5).

The posted notice of January 26, 1977 (exhibit GC-6) explaining employee bonus eligibility for 1977 remained posted throughout 1977 until the end of November 1977, when both the Union and company campaigns were in full swing. According to Plant Manager Douglas Contreras and Vice President Tancredi, Contreras took down the notice at that time, but did not replace it with a new no-

tice either explaining bonus eligibility or any change in the policy of January 26, 1977.[20]

Threats of Reprisals

On December 28, two days before the representation election of December 30, 1977, Respondent's President Al Contreras Sr. delivered a prepared speech to all employees on each of the shifts (General Counsel's exhibit GC-2). Contreras claimed he read the speech without deviation or comment.

Among other things, President Contreras told the assembled employees that the packaging industry was one of the fastest growing industries in the world and he expected Respondent to grow substantially. He stressed, as he had in his individual talks, that the Union would hinder that growth. He said:

> Our largest customer, the Mennen Company, which accounts for some 40% of this plant's sales is non-union. We are the sole decorator of Mennen packages. They have felt comfortable with our clean

[20] Vice President Tancredi claimed that internally, the company had decided in March 1977, after the Saddlebrook plant deal fell through, to revert to "past practice" in regard to bonus policy, meaning, he said, past practice prior to December 1976, and offered minutes of an Executive Planning Committee meeting of March 21, 1977 to bolster his claim (exhibit R-18). However, the language of the document is not only ambiguous, but also notes a decision to continue to look for a new building and maintain the moving expense fund. The events that followed, and noted above, indicated that Respondent continued to accrue cash for moving and had not abandoned the intention to move.

> record of no union trouble and no strikes at Permanent Label over the past 25 years. Sometimes when a company is unionized, customers divide their business between two or more vendors with different union contract expiration dates. They do this to eliminate the possibility of being cut off by a strike. I don't want to give the impression that just because a union is in a company there will be a strike, *but* we have shown you District 65's strike record, and you have seen the emphasis on strikes in their constitution.

On cross-examination, President Contreras admitted that he had no knowledge of whether the Mennen Company was concerned about the Union's organizational drive at Respondent's plant, nor did he know who in Mennen told him Mennen was comfortable with Respondent's clean record of no union trouble. Additionally, Contreras admitted that no one in Mennen told him that, if his company was unionized, Mennen would split its purchase contract between Respondent and another company; and he further admitted that he had no knowledge that Mennen, or other customers of Respondent, such as Helena Rubinstein, Revlon, Shulton, or Colgate, were considering dividing their purchasing contracts from Respondent with other packaging companies if Respondent's plant were unionized.

D. *Section 8(a)(1) Findings*

Coercive Interrogation

As related under heading *C*, Foreman Bevilacqua's interrogation of employee Daly in October 1977 to ascertain

the status of the Union's organizational campaign constituted coercive interrogation in violation of Section 8(a)(1) of the Act. That the interrogation might have been "friendly" did not lessen the interference with the employee's Section 7 rights, *Quemetco, Inc.*, 223 NLRB 470 (1976).

Foreman Bevilacqua's inquiry of employee Maria Garcia as to which of her co-workers supplied her with a Union authorization card was also coercive interrogation in violation of Section 8(a)(1) of the Act.

Interrogation by Respondent's President Contreras of employees, such as Linderoth, Ott, Mehmeti, and Saracco, and by therimage department supervisor Studt of 90 percent of the employees in his department, on why they wanted a Union, in the context of unequivocal opposition to the Union by the questioners, was likewise coercive interrogation in violation of Section 8(a)(1) of the Act, even addressed to employees who had openly declared their prounion sympathies, because such probing reasonably tended to interfere with the free exercise of employee rights under the Act, *Paceco, A Division of Freuhauf Corp.*, 237 NLRB No. 56, 99 LRRM 1544, 1545-1546 (1978).

Soliciting Grievances

Respondent's reaction to learning of the employee interest in the Union was a campaign of opposition to the Union. One of the means it chose was to create the impression that it would correct unsatisfactory conditions, with the intention of by-passing the Union.

On November 4, 1977, in connection with and following one of Vice President Tancredi's opening speeches to the

three shifts of employees, employee Grus responded to Tancredi's invitation and talked with him of several grievances. Tancredi suggested she draft a list of the grievances and assemble a committee of employees to participate with management in the discussion. He delegated Plant Manager Contreras to obtain the list from Grus and to set a time to meet with the employee committee. Tancredi also sought out employee Saracco and suggested that she gather a list of employee grievances and encourage the grievants to come to the office and discuss their problems.

In campaigning among the employees individually for defeat of the Union, President Contreras asked employee Berry about matters of employee dissatisfaction and encouraged her to contact him any time, even at his Bloomfield plant office, if there were other problems she wished to convey. President Contreras asked Dorothy Saracco, what her problems with the company were, and, after she told him, cautioned that he couldn't make a promise then, but now that he knew her complaints would make the company a better place at which to work.

President Contreras made inquiries of other employees about their grievances with the company, and Supervisor Jack Studt testified that he asked 90 percent of the employees in the therimage department to tell him what their major problems were.

In my view, Respondent's solicitation of the employee grievances in the pre-election context carried an implied promise that the grievances would be remedied if the Union was defeated, and such solicitation was a violation of Section 8(a)(1) of the Act. *Landis Tool Co.* v. *N.L.R.B.*, 460 F.2d 23, 24-25, 80 LRRM 2550, 2551-2552 (C.A. 3, 1972),

cert denied 409 U.S. 915; *N.L.R.B.* v. *Rollins Telecasting, Inc.*, 494 F.2d 80, 86 LRRM 2735, 2738-2739 (C.A. 2, 1974); *N.L.R.B.* v. *Eagle Material Handling, Inc.*, 558 F.2d 160, 95 LRRM 2934, 2937-2938 (C.A. 3, 1977). Merely reciting a "no promises" formula, or that the employer was precluded from making commitments, does not cancel the inference that the grievances raised would be corrected, *Landis Tool Co., supra, Reliance Electric Co.*, 191 NLRB 44, 46 (1971); *Raley's Inc.*, 236 NLRB No. 97, slip op. 4-5 (1978).

No Solicitation—No Distribution Rules

It was stipulated that Respondent's written rule in effect at the Clifton plant read in pertinent part:

> Employees shall not engage in solicitation or literature distribution during work time in any portion of the premises, or during nonwork time, in work areas of the premises. (General Counsel's exhibit GC-5)

Also, as set out under heading *C* above, on November 18, 1977, Foreman Bevilacqua warned employee Saracco that she could not pass out Union cards on company time (in which he expressly included lunch or break time saying, however, that she might talk on lunch or break time) and that she could not pass out Union cards or Union literature on the production floor or in the parking lot at any time because it was private property. Saracco's activity, involving solicitation by passing a Union card to another employee, occurred during the lunch break on the production floor.

Appendix B

Additionally, as set out under heading *C* above, on November 29, hot stamping department Supervisor Sanders interfered with distribution of Union literature by employee Roberts on company property outside the plant between the parking lot for employees and a building entranceway for employees, because the distribution was done on company property. (Roberts was not in the truck loading zone, and Respondent's statement in its brief that he was, was erroneous.) Roberts engaged in the distribution of the Union literature in his off-duty hours and was warned of disciplinary action if he persisted.

The board and courts in protecting employees' self-organizational rights at their places of work, have a drawn distinction between solicitation for union membership and distribution of union literature, based upon the different problems both pose for employer and employees. As a result, it has been established that the Act protects the rights of employees, during nonworking time, to solicit union membership while on company premises and to distribute union literature in nonwork areas on the company premises, unless the employer can demonstrate that unusual circircumstances necessitate some restriction on that right in order to maintain production or discipline. *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793 (1945); *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 616-623 (1962).

Therefore, the portion of Respondent's written rule that prohibits the employees from engaging in union solicitation during nonwork time in the work areas of the premises is overly broad and presumptively invalid, *Stoddard-Quirk Mfg. Co., supra,* 138 NLRB 615, 617. Even without evidence of enforcement, an overly broad no-solicitation rule has an inhibiting effect on lawful organization activities

and is illegal, *Joseph Horne Co.*, 186 NLRB 754, note 1 (1970); nevertheless, here, Foreman Bevilacqua sought to enforce the rule by warning employee Saracco against solicitation on the production floor at any time, though he enveloped the rule in a new and broader statement of its scope. In this connection, Bevilacqua equated the handing of a union authorization card to an employee being solicited with the distribution of union literature, whereas, under the law, the solictation process includes the giving of a union card to an employee, the signing by the employee, and the return of the card to the solicitor, *Farah Mfg. Co.*, 187 NLRB 601, 601-602 (1970). Thus Respondent's written rule, with or without Foreman Bevilacqua's enforcement of it, prohibiting employes from engaging in solicitation for the Union during nonwork time in the work areas of Respondent's premises was a violation of Section 8(a)(1) of the Act.

Of course, Foreman's Bevilacqua's restatement of the rule to employee Saracco on November 18, 1977, went even further than the written rule by precluding Saracco from Union solicitation with cards on "company time," in which he expressly included break time or lunch time,[21] or at any time if done on Respondent's property, and from distribution of Union literature at any time on Respondent's

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[21] Compare, *Essex International, Inc.*, 211 NLRB 749, 750 (1974), where an exclusion of union solicitation and distribution of union literature by employees during "working hours" (as distinguished from "working time" or "work time"), without clarifying the employee rights to solicit and distribute during lunch and break time, was held to be unduly restrictive of employee rights.

property including the parking lot. Such prohibition obviously violate Section 8(a)(1) of the Act.[22]

Respondent's written rule on distribution of literature, excluding distribution on nonwork time only in work areas, appears to be valid on its face. However, the revision announced by Supervisor Sanders on November 29, to prohibit employee Roberts from distributing Union literature on his off-duty time in a nonwork area of Respondent's property, adjacent to the parking lot and employee entranceway to the plant building, was beyond the orbit of permissible exclusion. Moreover, since the ban enunciated by Sanders was a more stringent rule then existed, promulgated orally at a time and in circumstances of employer hostility to and campaigning against the organizing activity of its employees, it was obviously announced and enforced for a discriminatory purpose, *Heritage House of Connecticut Inc.*, 192 NLRB 1081, 1081-1082 (1972). Respondent's claim that employee Roberts was ordered to desist from his distribution in order to prevent creation of a safety hazard was not established, and appeared to be an afterthought (see heading *C* above). The promulgation and enforcement of the rule by Supervisor Sanders was

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[22] There was no showing of unusual circumstances that might excuse the restrictions stated and enforced. The fact that the hot stamping department worked while the therimage department lunched was not such a circumstance, since each had its own location. Moreover, the evidence of other nonoccupational solicitations permitted on the plant production floor, including church fund raising by raffles and sales of candy and the sale of Avon products, while denying employees the privilege of engaging in Union solicitation, was a discriminatory application of the rule in violation of Section 8(a)(1) of the Act, *Imco Container Co.*, 208 NLRB 874, 878 (1974).

an interference with the employees' right of self-organization in violation of Section 8(a)(1) of the Act.

Promise of Benefits to Discourage Union Support

As set out under heading *C,* President Contreras and Vice President Tancredi promised employee Ott Blue Cross-Blue Shield benefits. Contreras promised employee Mehmeti the possibility of furthering her education. Contreras told employee Linderoth and Grus that they would have a future with the company if the Union did not come in and, in Grus' case, the possibility of employment as a computer technician. Contreras urged employee Berry, and Supervisor Studt urged employee Demonteverde, to give Respondent a year, from January to January, to rectify past problems. Contreras promised employe Saracco that if the Union lost, Contreras would see that the company was a better place at which to work.

Promises of benefits by an employer, during a union organizational campaign or pending a representation election, have a coercive effect, because employees are not likely to miss the inference that the source of benefits presently conferred is also the source from which future benefits must flow, that may dry up it not obliged, *N.L.R.B.* v. *Exchange Parts Co.,* 375 U.S. 405, 409 (1964).

The promise of benefits need not be specific in nature or as to the time of its implementation, and need not be expressly conditioned on abandonment of union support. Thus, a promise that the company would someday better itself and offer the employees more, constituted a promise of future benefits in violation of Section 8(a)(1), *JFB Mfg. Inc.,* 208 NLRB 2, 6, and note 1 (1973). In *Hubbard Re-*

gional Hospital, 232 NLRB 858, 870 (1977), a statement of the hospital board communicated to the nurses, saying that the board realized management mistakes had been made and it was willing to correct them and asked the nurses to give the board another chance, was held to be a promise of benefits in violation of Section 8(a)(1) because, "while the benefits promised were not spelled out, the message was nonetheless clear that the improvements would come if the nurses gave the hospital another chance, i.e., rejected the Union."

Respondent's promises to its employees, made in the context of the impending representative election, were promises of benefits designed to induce and coerce the employees to abandon their support of the Union, and were in violation of Section 8(a)(1) of the Act.

Grant of Benefits—Year End Bonuses

As recounted under heading *C* above, one year before the representation election of December 30, 1977, namely, at the end of December 1976, Respondent changed its prior unwritten policy of including all employees in the year end bonus. Instead, it excluded those employees with less than six months of employment at the end of December 1976. And it did this, without notifying any employees, in advance, of either the fact or the reason for it.

Indeed, Respondent concealed the reason, which was that it contemplated a plant move to another town, Saddlebrook, New Jersey, in 1977, which involved moving both the Clifton and Bloomfield plants and consolidating them into one plant, and Respondent had decided to put part

of the cash otherwise available for bonuses into a moving expense account.

In January 1977, to increase the size of the moving expense account, Respondent decided to increase the exclusions from the bonus for the year ending December 1977, by excluding persons with less than one year's service. This time Respondent posted in the plant a notice to the employees on January 26, 1977, informing them that only employees on the payroll on December 31, 1976, would be eligible for a bonus. Again, no reason was revealed, because Respondent feared, that if the employees were informed of the contemplated move, many might quit before Respondent was ready to move and consolidate the personnel of the two plants it would need for the one plant.

Although, Respondent claimed that it decided internally, in March 1977, when the deal for the Saddlebrook plant fell through, to restore, for the end of 1977, the bonus policy of 1975 and prior years of including all employees in the bonus, this was not established. The contrary appeared to be the case, because Respondent continued the search for another suitable building, and, as its September 30, 1977 third quarter financial statement showed, Respondent continued the growing moving expense account for a move in the latter part of 1977. The notice of January 26, 1977, establishing which of the employees were included in and which were excluded from the 1977 bonus, remained posted in the plant until the end of November 1977, when, without notice or explanation to the employees, the notice was taken down by Plant Manager Contreras and nothing on bonuses put up in its place. The Union organizational campaign and Respondent's antiunion campaign were then in full swing.

Appendix B

In view of the employee experience with the prior bonus in December 1976, when a group of them were shut out of sharing in the bonus without notice or explanation, it was not unreasonable for the employees to infer that the removal of the January 1977 bonus policy notice at the end of November 1977, without substitution or explanation, presaged either a denial of bonuses to all employees or an increase in the class to be excluded, due to the employees' current organizing attempt. By the same token, when, just prior to the election of December 30, 1977, Respondent, again without notice or explanation, paid all employees a bonus, including those who were not eligible under the January 1977 posted policy, it was not unreasonable for the employees to infer that Respondent sought to influence their voting selection by paying for votes against the Union with this 11th hour show of generosity.

In my view, the December 1977 bonus benefit was conferred on all employees at a time and in a manner intended to influence the employees' choice against Union representation, in violation of Section 8(a)(1) of the Act. *N.L.R.B.* v. *Exchange Parts Co., supra,* 375 U.S. 405, 409; *Baltimore Catering Company,* 148 NLRB 970, 973-974 (1964).

Discouraging Wearing of Union Insignia

As set forth under heading *C* above, President Contreras asked employees Grus and Mehmeti to remove the Union button that each wore.

Respondent contends this was done as a joke, and if the employees understood the statements were made as jokes,

there was no violation. The evidence showed that each of the employees took her wearing of the Union insignia seriously, did not regard the Contreras request as a joke, but declined to remove the button.

The right to wear union insignia at work is a protected activity under Section 7 of the Act, particularly in an organizational campaign, *Republic Aviation Corp.* v. *N.L.R.B., supra,* 324 U.S. 793, 802 note 7. Such right was interfered with by the request of Respondent's President Contreras in asking the employee to remove the insignia. It is not essential in finding a violation that there be an explicit threat of reprisal, it being implicit that the employee disobeys at his peril, *Great Atlantic and Pacific Tea Co.,* 192 NLRB 645, 659 (1971). Respondent's interference was a violation of Section 8(a)(1) of the Act.

Coercing Employees To Induce Other Employees To Cease Union Support

The evidence was (heading *C* above) that President Contreras asked employees Grus and Iwanicki, both with reputations of being well liked by fellow employees and voluble, to use their influence with fellow workers to persuade them to vote against the Union, and Grus told this to several employees.

While an employer may lawfully ask employees to vote against a union, he violates Section 8(a)(1) when he asks an employee to make the same request of other employees, such as "talk the union down," *Federal Stainless Sink Division of Unarco Industries,* 197 NLRB 489, 500 (1972); or "convince them it was better for the store not to go Union," *Montgomery Ward and Co.,* 226 NLRB 184, 201

(1977). The effect upon an employee so asked is coercive, whether or not the employee is in fact coerced into complying.

Respondent's conduct here violated Section 8(a)(1) of the Act.

Threats of Reprisal

As set out under heading *C* above, President Contreras, in his individual conversations with employees, separately told employees Linderoth and Iwanicki that, if the Union came in, he was not going to work as hard for the business as he had worked and would sit back and no longer care about the company.

Again, in individual conversation, President Contreras told employee Iwanicki that she should think about the fact that the Union would be bad for the Company and ruin him, that a lot of customer companies might not want to sign contracts with Respondent if the Union came in because they feared strikes and preferred to deal with nonunion companies, and that employees would lose jobs and she might be one of them. He told employee Grus that customer companies, like Colgate, Mennen, Proctor and Gamble, would not renew their contracts with Respondent if the Union came in, because they were afraid of strikes, and as a result a lot of Respondent's employees would be laid off. He told employee Saracco that if Mennen (Respondent's largest customer) took away 40 percent of Respondent's business, production would slow down, employees would be laid off.

At the meetings with all employees two days before the representation election, President Contreras told them that

Appendix B

Mennen is Respondent's largest customer, for whom Respondent is the sole decorator of packages and who provides 40 percent of the Clifton plant sales; that Mennen is nonunion and feels comfortable with Respondent's past record of no union trouble and no strikes; that sometimes when a company is unionized, customers divide their business between two or more vendors with different union contract expiration dates to eliminate the possibility of being cut off frm supply by a strike; and to bear in mind the Union's strike record and the Union's emphasis on strikes in its constitution, which documentation, he reminded them, had been shown to them.

In connection with his references to Mennen and other customer companies, President Contreras admitted that he didn't know whether they were concerned about the Union's organization drive at Respondent's plant, or who in Mennen told him that Mennen was comfortable with Respondent's record of no union trouble; further, he admitted, that no one in Mennen told him Mennen would split its contract between Respondent and another supplier if Respondent's plant were unionized, and that he had no knowledge that Mennen or any other customer of Respondent was considering dividing their purchase contracts from Respondent with other packaging companies, if Respondent's plant were unionized.

The statements by President Contreras to the assembled employees, and to them individually, that unionization of the plant would result in loss of business from customers and that employees would lose jobs, was not privileged, under Section 8(c) of the Act, as either general opinions about unionism, or predictions based on objective fact to convey the employer's belief as to demonstrably probable consequences beyond his control, *N.L.R.B.* v. *Gissel*

Packing Company, Inc., 395 U.S. 575, 618 (1969). Respondent admittedly had no basis in objective fact for these assertions. *Hertzka and Knowles*, 206 NLRB 191, 194-195 (1973); *Kranco, Inc.*, 228 NLRB 319, 322 (1977);[23] and see *Ethyl Corporation*, 231 NLRB 431, 433 (1977), holding that the supposition of a greater likelihood of strikes does not constitute objective fact within the meaning of *Gissel, supra*. The statements by Contreras were impermissible threats designed to coerce the employees into adopting Respondent's antiunion position, and violated Section 8(a)(1) of the Act.

President Contreras' statements to employees that, if the Union came in, he was not going to work as hard for the business as he had in the past and would sit back and no longer care about the company, was the counterpart of his promises to employees that if the Union did not come in, the business would grow, the employees would grow with it, and he would take care of their grievances, and he would make the company a better place to work. The counterpart statements were thus a thinly veiled

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[23] Respondent relied upon *Southern Frozen Foods, Inc.*, 202 NLRB 753, 754-755 (1979), affd. 501 F. 2d 868, 86 LRRM 2993, 2999-3000 (C.A. D.C., 1974), in its claim that asserting there would be a loss of business and jobs was a permissible prediction; but the case is distinguishable from the cases cited above and the facts here, in that the Board found factual support for the supervisor's campaign assertion (that unionizing would cost the employees jobs) in company history set out in a supplemental company campaign letter to the employees, telling them that some of their work was work taken from another of the employer's plants because the same union, in that plant, allegedly insisted upon a change in method of operations, which, if carried over to the plant being organized, would result in loss of work and jobs.

threat that Respondent would be less responsive to the employees' needs for changes if they chose the Union than if they rejected it, *Southern Frozen Foods, Inc., supra,* 202 NLRB 753, 755, and violated Section 8(a)(1) of the Act.

Instructing Three Nonsupervisory Employees to Cease Support of Union

At the Board conference concerning the representation case on November 29, 1977, Respondent took the position that in addition to the department heads and shift supervisors, who the Union agreed were statutory supervisors, there were several other employees whom Respondent regarded as statutory supervisors and whom it categorized as "assistant supervisors" for purposes of exclusion from the description of the bargaining unit which was evolved. There was no plant title of assistant supervisor, no employee had been designated as such, and, of course, the Union did not agree that there were any such who were statutory supervisors even without the title.

In the week of December 6, 1977, Plant Manager Douglas Contreras held a meeting of the department heads (called department supervisors) and shift supervisors (called foremen), to which he summoned employees Robert Linderoth, Alice Gorski, and Dorothy Saracco. In the presence of the others, Contreras read to them the Act's definition of a supervisor, and told the three employees, for the first time since the employment of each began, that Respondent considered each to be a supervisor; further, as supervisors it was unlawful for them to engage in Union activity and, if they did, Respondent had the right to take action against them. Contreras disclaimed threat-

ening them with discharge, when asked about it by Linderoth, but went on to indicate, by an analogy, that he was indeed threatening them with discharge if they continued to be involved in Union activity. All three employees left the meeting understanding that they were in jeopardy of discharge if they had anything more to do with the Union.

As detailed under heading *C* above, though the three employees had eight, five, and two years employment respectively, this meeting in early December 1977 was the first occasion any of them had been informed that he or she was a supervisor, and was the first and only meeting of supervisors that any of them attended. No employee testified that he or she considered Linderoth, Gorski, or Saracco to be a supervisor and a goodly number testified that they did not know, or consider, them to be supervisors.

A. Gorski Status

Alice Gorski was an employee of Respondent for eight years (at the time of trial), who had always worked on the thermiage department production line, as feeder-packer-inspector or line attendant, both before and after the election of December 30, 1977. In August 1977, she was asked by her supervisor, Foreman Ed Alegre, to perform an additional function as "floor lady" on a temporary basis, continuing at her same hourly wage of $3.91 per hour; and after the election she resumed full time as a line attend-[24]

[24] Vice President Tancredi claimed that it was a trial arrangement, and if it had worked out, she would have been given a wage increase.

Appendix B

As floor lady, employee Gorski continued to work on the production line, wherever she was needed, but she was additionally responsible to rotate the feeder-packer-inspectors every 1½ hours from feeding and packing to inspecting, and vice versa. Rotation was necessary, said Gorski, because feeding and packing was harder physical work, whereas inspecting involved sitting and watching, and each girl was expected to do her share of both types of work. While tending to the rotation relieved Foreman Alegre of doing this, rotation nevertheless was purely routine and involved no exercise of discretion by employee Gorski. Gorski also helped out new workers but she was not asked to assess how they were doing. If Foreman Alegre told her to layoff an employee she did so, but she made no recommendations for layoff; indeed, she testified, when she once suggested to Alegre that he use seniority as the basis for layoffs he declined to follow her suggestion.

As floor lady, employee Gorski continued to punch a time clock and needed permission from a supervisor to work overtime.

Foreman Alegre did not testify, and there was no contradiction of employee Gorski's testimony. Since whatever instructions Gorski issued originated with Alegre, and since she used no independent judgment or discretion in performance of her duties, her status never rose to that of a statutory supervisor. *Maremount Corp.*, 239 NLRB No. 37, 99 LRRM 1573, 1574 (1978).

Moreover, her situation as floor lady was at best temporary and experimental; she was not told that she was, or was to become, a supervisor; and there was no evidence that any employee regarded her as a supervisor. On the contrary, employee Ott on her shift testified that Gorski was not a supervisor and was not regarded as such.

Appendix B

I find that employee Gorski was not a supervisor within the meaning of the Act.

B. Saracco Status

In the five years of her employment at the time of trial, employee Dorothy Saracco had been the quality control person on the first shift of the thermiage department. Her duties comprised checking the production lines for quality defects to see that they were producing labeled bottles according to expectations, and occasionally taking pre-samples of the line.

Employee Saracco's supervisor was department Supervisor Jack Studt. This was simply a matter of choice rather than logic on the part of Plant Manager Contreras (as he indicated) in dividing up supervisory responsibilities between Studt and first shift Foreman Bevilacqua. In practice, Saracco turned to Bevilacqua more often than Studt when correction on the production line was needed; and in turn Saracco carried out certain requests Bevilacqua made, such as telephoning people to come in to work.

Employee Saracco's pay in October 1977 was $4 per hour, and she punched a time clock. It was conceded by Respondent that no employee reported to her, and there was no evidence that she supervised any of the other employees.

Employee Saracco's counterpart in quality control on the second shift (with whom on occasion she traded shifts) was Tessie Wangrycht. Though Wangrycht and Saracco had the same responsibilities, as Foreman Bevilacqua and

Saracco pointed out, there was no contention that Wangrycht was a supervisor.

Respondent's claim that Saracco exercised supervisory or, more accurately, managerial authority rested on two contentions. The first was that she had authority to stop a production line that was not labeling the bottles properly. However Saracco pointed out, without contradiction, that any one of the feeder-packer-inspector girls who was doing inspection could do the same thing. Saracco testified that when she halted a production line she immediately reported to Foreman Bevilacqua, who provided the necessary corrections, but his decision controlled the restart. (Bevilacqua testified in accord.)

The second contention was that employee Saracco hired new employees. Saracco testified that in the period August-December 1976, before Foreman Bevilacqua was brought in to supervise the first shift of thermiage (Bevilacqua began as first shift termiage department foreman in the third week of December 1976), Supervisor Studt was doing the hiring and asked her as a favor to do some of the job applicant interviewing and relieve him from being pulled off the production floor in their then busy season; but that when Bevilacqua came in, in December 1976, he did his own hiring including interviewing the applicants. It should be noted that Vice President Tancredi testified on cross-examination, that it was Studt who decided on asking Saracco to assist him with hiring, that Saracco was given no increase in pay for the additional duty but did get an extra $100 bonus at the end of the year 1976. Tancredi conceded he did not know if Saracco made evaluations of applicants, or how many employees she hired or whether she merely called in previously approved applicants.

Appendix B

Superivsor Studt agreed that he asked and used Saracco, in that rush summer period, to aid him in looking at job applicants before he obtained Bevilacqua as his first shift foreman. There was no list of requirements for the job of feeder-packer-inspector, said Studt, because there was no special training or skill needed for the job, and Saracco's appraisal of the applicant amounted to ascertaining if the applicant had any physical handicap in the hands, and looking at the job application to see what type of work the applicant had previously done, if any. While Respondent preferred applicants who could read English, to pick up any defects in labels, said Studt, Saracco did not give any English tests. Studt said that, after Bevilacqua became foreman of the first shift, Saracco assisted Bevilacqua with job applicants; but what this amounted to, according to Bevilacqua, was handing her a batch of applications of persons who had been in and had filed, and having her telephone them to come in to work if available. Saracco testified that when Studt previously had done the hiring he had followed a similar pattern in having her call new people in.

Studt testified that he learned for the first time that Saracco was considered a supervisor at the December 1977 meeting when Saracco, Linderoth, and Gorski were told they were supervisors. No employee testified that he or she considered Saracco to be a supervisor, and employee Garcia testified that she did not know, or regard, Saracco to be her supervisor.

The use of employee Saracco as a temporary, part-time adjunct in the hiring process involved her purely in a routine process of gathering information for those charged with doing the hiring, plus notification of applicants whom Respondent was prepared to hire to report for work. This

function did not require any managerial or supervisory judgment, and there was no basis for finding Saracco to have been a supervisor or part of management. She was an employee within the meaning of the Act.

C. Linderoth Status

Employee Robert Linderoth, whose employment began in January 1976, was the senior material handler of the eight material handlers on the second shift of the termiage department. He was an hourly paid employee who punched a time clock and was paid (in the October-December 1977 period) $3.91 per hour. Employee Michael Roberts, who began work with Respondent as a material handler on the same second shift ten months later, was paid at the same rate of $3.91 per hour.

The responsibility of the material handler was to provide clear bottles for the line he was working and remove the labeled bottles in cartons. The line was horse-shoe-shaped and, after the labeling was completed, the bottles came back to the point of origin and automatically into boxes, which the material handler sealed, put on a skid, and removed to an area back of the line. All material handlers were expected to work on all lines, but on a rotation basis in order to spread the physical burdens, so that each handler shared the faster and slower lines over the period of the shift.

Employee Linderoth's supervisor was second shift Foreman Alegre, who though in Respondent's employ at the time of trial was not proffered as a witness and did not testify. Linderoth testified that at the start of the shift Alegre would hand Linderoth, as the senior material hand-

ler, a priority list of the day's projects, and Linderoth would assign each of the eight handlers, including himself, a starting line and the order of rotation. There was no need for making judgments as to which material handlers worked better or faster, said Linderoth, because the rotation would equalize the performance, as well as the burden, of the work. Linderoth said he took between one and two minutes to make the starting assignments and then worked manually at the production lines for the rest of the day. If any of the material handlers did not come in on a given day, it was up to Foreman Alegre to decide which lines would run when he handed Linderoth the priority list.

Linderoth testified that while in a "loose fashion" the rotation assignment function would seem to suggest that he was in charge of the material handlers, such was not the fact. The handlers usually reported their problems to Foreman Alegre, said Linderoth. Alegre checked them himself, and if they appeared to exist might come to Linderoth for verification or consultation, as, for example, in the case of employee McNair who was fired for openly sitting on the production floor, which fact came first to Alegre's attention from other employees. Linderoth testified that he did not have time to check if other material handlers were performing properly because he ran his own lines for the duration of the work day.

Further, said Linderoth, if a handler ran out of stencils for marking the boxes, the handler went to the quality control girl for stencils. If the handler ran out of material from the warehouse, the handler would go to the forklift drivers to bring the material. If something went wrong with the counters that automatically filled the boxes, the handler would go to a line mechanic for assistance.

Appendix B

Employee Linderoth testified that he had no authority to give time off or to correct timecards, that he did not attend production meetings or supervisors meetings, and that he received the same half-hour meal break and the same scale of vacation time alloted to all other employees who were not supervisors.

Respondent claimed that employee Linderoth participated in the layoff process affecting material handlers. However, Linderoth testified that Foreman Alegre consulted him only for information on the seniority aspect in connection with layoffs, and Linderoth named employees Crespo and Wilder, in the category of lowest seniority layoffs, employee Bonafield a voluntary layoff, and employee McNair, noted above, a discharge for sitting down on the job. In each of the cases, said Linderoth, the decision was Alegre's decision; and Alegre asked him to inform the employe of Alegre's decision.[25]

Respondent never told employee Linderoth he was a supervisor until the pre-election meeting of early December 1977 when, for the first time, the three employees including Linderoth were told so. His chief, department supervisor Jack Studt, also learned of it then for the first time. The president of the company, Al Contreras Sr., didn't know of it until sometime after that meeting, and after he had had two conversations on the production floor

[25] Since Foreman Alegre did not testify and no reason for his failure to testify was offered, it may be inferred that his testimony would be unfavorable to Respondent and would not contradict employee Linderoth, *Goodyear Tire and Rubber Co.*, 190 NLRB 84, 86 note 3 (1971), affd 456 F. 2d 465, 79 LRRM 2817, 2819 (C.A. 5, 1972).

with Linderoth.[26] Significantly, Contreras testified that during his conversations on the plant floor with Linderoth in December 1977, Linderoth was performing his regular work of feeding bottles into a hopper and moving boxes of labeled bottles from the production line. No employees testified that they regarded Linderoth as a supervisor, and six employees of therimage second shift (identified under heading *C* above)testified that they did not know or regard Linderoth to be their supervisor or any employee's supervisor.

At most, employee Linderoth's position among the material handlers of the second shift was that of leadman, or lead person, the superior worker who exercised the control of a capable worker over less capable employees, but who did not enjoy supervisory status in that capacity because he did not also share the power of management, *N.L.R.B.* v. *Griggs Equipment, Inc.*, 307 F. 2d 275, 279 (C.A. 5, 1962). Congress intended to leave the leadman category under the protection of the Act, *N.L.R.B.* v. *Security Guard Service, Inc.*, 384 F. 2d 143, 146-148 (C.A. 5, 1967). The kind of instructions he gave helpers on how to help did not denote the exercise of supervisory discretion or independent judgment, but only the exercise of routine authority, *N.L.R.B.* v. *Whittin Machine Works*, 204 F. 2d 883, 886 (C.A. 1, 1953).

The ultimate controlling judgment in regard to employee Linderoth, as well as to employees Saracco and Gorski, is that neither their respective positions with Respondent,

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[26] The same was true in the cases of employees Saracco and Gorski, and in the case of all three employees President Contreras testified that he never saw any of them at a supervisor's meeting.

nor their respective responsibilities in those positions, identified them with management, *International Union of United Brewery etc. Workers* v. *N.L.R.B.*, 298 F. 2d 297, 303 (C.A. D.C., 1961), cert. den. sub. nom. *Gulf Bottlers* v. *N.L.R.B.*, 369 U.S. 843. Linderoth, Saracco, and Gorski were employees within the meaning of Section 2(3) of the Act and were not supervisors (or managerial employees) within the meaning of Section 2(11).

D. The Section 8(a)(1) Violation

Admittedly, Respondent had knowledge of the Union activities of employees Linderoth, Saracco, and Gorski prior to the representation conference at the Board on November 29, 1977, if only from their participation with Union Organizer Acosta as part of the in-plant organizing committee that requested Union recognition in early November 1977.

I agree with General Counsel that Respondent's meeting thereafter, in early December 1977, of "assistant supervisors", aimed at Linderoth, Saracco, and Gorski, was part of a scheme, made obvious by the flimsy basis and timing of it, to eliminate three of the most active Union supporters and to thereby discourage further Union activities of other employees. Plant Manager Contreras' threat of discipline for the three employees, if they continued providing assistance to the Union, was intended to stamp out any further expression of pro-Union sentiments by them.

Singling out Union adherents, in a special meeting with supervisors, to lecture and warn the employees about their Union activities, has an intimidating and coercive effect upon their Section 7 rights, in violation of Section 8(a)(1)

of the Act, *Carolina Steel Corp.*, 225 NLRB 20, 22-23 (1976); and the threat to discipline them, if the employees did not desist, aggravated the violation. The employer's mistaken impression or opinion that the employees were supervisors is no defense to the Section 8(a)(1) violation, *Berton Kirshner, Inc.*, 209 NLRB 1081, 1087 (1974); *Answering, Inc.*, 215 NLRB 688, 689 (1974).[27]

B. *Section 8(a)(3) Findings*

As summarized under heading *B* and *C* above, after a tenative, aborted start in early 1977, employee Daly initiated the Union's organizing drive in the Clifton plant in September-October 1977. He recruited others, in and about the shop, leading to the Union meetings of the employees starting in mid-October and the establishment of the in-plant organizing committee, he was among the first to sign a Union authorization card, and he solicited signing by other employees in the company parking lot and elsewhere. Daly interested his personal friend and coworker Eleanor Ott (who worked the second shift with him, accompanied him to and from work, and spent time with him on plant breaks) to become active, and she attended the October and later Union meetings, discussed

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[27] General Counsel is correct in pointing out that even if employees Linderoth, Saracco, and Gorski were held to be supervisors, the warning and threat to them would still violate Section 8(a)(1), on the ground that the employer's action had the necessary and intended effect of interfering, not with the rights of the supervisors, but with the rights of nonsupervisory employees who become aware of the discrimination and are thereby coerced in the enjoyment of their own statutorily protected rights, *VADA of Oklahoma*, 216 NLRB 750, 759 (1975), and cases cited.

the Union with co-workers, signed a Union authorization card, and became a member of the in-plant organizing committee.

Daly had been warned earlier by Foreman Bevilacqua that he could be fired for talking for the Union, and was interrogated twice in late October by Bevilacqua about the Union organizing.

Without germane notice or warning, Respondent discharged employees Daly and Ott, notifying Daly out of hours in the early morning of November 2, 1977 and Ott at the plant a few hours earlier, at about midnight of November 1, with the end of the second shift. (For all practical purposes both discharges were simultaneous and effective November 2.) Both employees were told that they were discharged because of their absences.

Apart from the fact that the record of the absences of each was overstated and inaccurate, there was good cause for inferring that Respondent's stated reason for the discharge of Daly and Ott was not the real reason.

Respondent's antiunion animus was clear and unrelenting. As President Contreras stated, there had been attempts to organize the plant before this attempt, he was constantly vigilant against renewed attempts, and he had been successful in keeping the Union out. The summary of his actions in this case, together with the related actions of the other managerial and supervisory staff of Respondent, denoted a spirit and willingness to take any means deemed necessary to defeat the Union and to deprive the employees of an untrammeled choice of a bargaining representative, including unlawful means. While most of Respondent's unfair labor practices occurred in the two month period immediately following the discharge of em-

ployees Daly and Ott, such actions were relevant to and reflected Respondent's attitude immediately prior to the discharge, *Angwell Curtain Co.* v. *N.L.R.B.*, 192 F. 2d 899, 903 (C.A. 7, 1961).

Respondent's awareness, before the discharge, that employee Daly was engaging in Union organizing activity was shown by Foreman Bevilacqua's interrogation of him concerning Union organizing. In employee Ott's case, Respondent either knew, or correctly surmised that she too was so engaged through her close relationship with Daly. A discharge motivated by the employer's belief or suspicion that an employee was engaging in union activity violates the Act, *N.L.R.B.* v. *Clinton Packing Co., Inc.*, 468 F. 2d 953, 955 (C.A. 8, 1972).[28]

Also, the fact that the plant was small (about 120 employees) and divided into shifts (complement of the second shift about 40 employees) helps sustain an inference of Respondent's knowledge of Daly's and Ott's Union organizing activity, *A to Z Portion Meats*, 238 NLRB No. 57, 99 LRRM 1527, 1528 (1978).

Futher, even if the direct evidence, which is present here, were not available on the issue of employer knowledge of the employees' union activity, such knowledge may reasonably be inferred from an obvious pretextual discharge; thus, the employer's knowledge of union activity may be proved by the same evidence used to establish his antiunion motivation in discharging the employees, *N.L.*

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[28] And see, *L.B. Foster Co.*, 192 NLRB 319 (1971), holding that a layoff of employees sympathetic to a union and employees whose sympathies were unknown, discouraged union activities of all employees and violated Section 8(a)(3) of the Act.

Appendix B

R.B. v. *Wal-Mart Stores, Inc.*, 488 F. 2d 114, 117-118 (C.A. 8, 1973).

Respondent's contention that it did not know that there was Union activity among its employees until the end of the day of November 3 (the day following discharge of Daly and Ott), was not credible. Vice President Tancredi and Plant Manager Doug Contreras claimed they were first told of the Union activity at the end of the day of November 3, when therimage department Supervisor Studt burst into Tancredi's office, without knocking, to tell them there was a problem, a union was being formed. Tancredi said he asked Studt how did he know, and Studt replied, he overheard some discussion of it on the production floor. Tancredi told Studt to learn more. Tancredi testified that he wasn't overly concerned, he wasn't sure it was true or if true how serious. Nevertheless, he notified President Al Contreras Sr., though, said Tancredi, there was nothing of substance to relate.

Supervisor Studt testified that at about 4 p.m. of November 3 he was standing at the entrance to the cafeteria engaged in conversation, when he heard voices just inside the cafeteria saying that a good turnout of the employees on the second shift had signed Union cards. Studt further testified that he didn't know if the voices were the voices of employees or who the persons were, though by simply turning and looking, he said, he could have seen who they were; however, he wasn't interested, he said, even though he had never heard Union talk in the plant before, and he continued his conversation with the person to whom he was talking, who, and the subject of the conversation, he could not remember.

Studt said he went immediately to Tancredi's office, burst into his office, without knocking,[29] and told what he had overheard. Studt testified that Tancredi did not tell him to find out who were involved in the organizing or who were with the Union, but only to let him know if he heard anything more.

What added a further touch of unreality to this testimony was that though Vice President Tancredi was not, as he said, overly concerned by Studt's report and wasn't sure that it was true, by early next morning, November 4, he had already consulted a labor lawyer, whom he had not known before, had prepared a written speech opposing the Union, and assembled the employees to formally launch Respondent's countercampaign against the Union. I think it was evident that Respondent had much more and earlier knowledge about the Union organizing than it was willing to admit, well before November 3; and, of course, Foreman Bevilacqua's interrogation of employee Daly, in late October 1977, on union organizing, was an indicia of that.

Thus, the discharge of employees Daly and Ott was the real opening gun in Respondent's countercampaign, and the second shift employees sensed it and used the occasion of Respondent's November 4 speech to petition for reinstatement of Daly and Ott.

Looking at the alleged reason for the discharge of Daly and Ott, their absences from work, while it was true that each had a record of absences, Respondent

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[29] Everyone who testified about this incident, including President Al Contreras Sr. who wasn't there, remembered it was "without knocking."

sought to exaggerate the record at trial. Even more significantly, in connection with the later reinstatement of Daly and Ott, Vice President Tancredi and President Contreras conceded that examination of Respondent's records revealed many more employees, with records of many absences, who were not discharged or disciplined for absences as Daly and Ott allegedly were.

It was also established that Respondent had never given employees Daly and Ott any prior warnings or discipline for absences. Respondent's concern regarding absences did not become evident until the organizing drive of the Union began, which would indicate that prior thereto Respondent did not regard the absences as important or had otherwise condoned the absences.

Considering Respondent's intense hostility to the Union and the contemporaneous commission by Respondent of other unfair labor practices, the abrupt discharge of employees Daly and Ott, without notice or warning, for a pretextual reason, on November 2, 1977, leaves the inescapable inference that both were discharged because of their role in the ongoing Union organizing campaign, in order to discourage Union activities and Union membership of Respondent's employees, in violation of Section 8(a)(3) and (1) of the Act. And see, *Borek Motor Sales, Inc.* v. *N.L.R.B.*, 425 F. 2d 677, 680-681 (C.A. 7, 1979), cert. denied 400 U.S. 833, holding that even the presence of valid grounds for an employee's discharge does not legalize a dismissal which was nevertheless due to a desire to discourage Union activity.

The reinstatement of employees Daly and Ott on November 16, 1977, and the commutation of the discharge

to suspension without pay for two weeks, did not purge the discriminatory motive of the discharge but merely reduced the extent of the discriminatory discipline.

F. *Section 8(a)(4) Findings*

The facts concerning and surrounding the attendance of employees Roberts, Linderoth, and Ott at the Board conference of November 29, 1977, to assist the Union on the representation petition, were detailed under heading *C,* above. They attended during the day on their own time, not on company time; and, when it appeared that the Board conference might extend beyond the four o'clock start of their shift, agreed that employee Roberts should notify the plant beforehand. He called at about 3:30 p.m., when it looked like the three of them would no longer be involved in the conference, and informed Supervisor Sanders where they were and that they could arrive at the plant about five or ten minutes late.

However, Vice President Tancredi, who was attending the Board conference for Respondent, had already called the plant ahead of employee Roberts, without talking to any of the three employees, to advise Plant Manager Contreras that there were three second shift employees at the conference who he didn't believe could get to work on time. As a result of Tancredi's call, Contreras claimed he made arrangements for other employees to cover the places of the three employees, and told Supervisor Sanders to tell Roberts and the other two not to come in. Sanders told Roberts that Respondent had instituted a policy that employees who did not start the shift on time would not be permitted to work, and the three should not bother

to come in that day but consider themselves suspended without pay for the day, and report for work the next day.

If this was a policy, it was new and unannounced previously, and was contrary to existing company practice that did not exclude employees from work who arrived late (whether on advance notice or not).

In my view, the one-day suspensions of the three employees, who attended the Board conference on November 29 to assist the Union in the matter of the representation petition, were discriminatory and retaliatory actions against them by Respondent, because of their assistance to the Union. As such, the actions violated Section 8(a)(4) of the Act, which protects employees against employer reprisals in their attendance at, or participation in, Board proceedings, whether they are formal or informal or investigative, or whether the employees attend or participate under subpoena or voluntarily, *N.L.R.B.* v. *Scrivener*, 405 U.S. 117, 79 LRRM 2587, 2588-2590 (1972).[30]

G. *The Bargaining Unit And Union Majority*

The parties stipulated in the representation case that an appropriate unit comprised:

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[30] Respondent's reliance on *John Wanamaker, Philadelphia Inc.*, 199 NLRB 1266 (1972), for authority to discipline these employees unless they were attending the Board conference pursuant to subpoena, is misplaced. In that case a majority of the Board found that two employees who had not engaged in Union activity were legitimately discharged for failing to clock out on two days for which they expected to be paid, and had absented themselves for "personal reasons."

Appendix B

All employees employed by the Employer at its Clifton, New Jersey facility but excluding all office clerical employees, professional employees, managerial employees, guards, assistant supervisors and all other supervisors as defined in the Act.

The parties also stipulated that when the Union made its request for recognition on November 11, 1977, the unit consisted of at least 118 employees, plus a possible additional eight employees depending upon determination of the status of each.

I have already determined that employees Daly and Ott, who were discharged and retroactively in suspension for the period that included November 11, 1977, had been unlawfully discharged and suspended and were part of the unit as of November 11 (see heading *E*, above). I have also determined that employees Linderoth, Saracco, and Gorski were not supervisors within the meaning of the Act (see heading *D*, subheadings *A*, *B*, and *C* above) and, of course, they are not assistant supervisors or supervisors as those terms are used in the stipulation of the appropriate unit. Therefore, all three of them were properly part of the unit on November 11, 1977. Adding these five employees brings the unit to 123 employees.

Stanley Newick Status

One of the remaining three persons whose status requires determination is Stanley Newick, employed by Respondent fourteen years. Prior to his present post, he was in charge of plant production.

At the time of trial and for the prior four years, Newick had been in charge of plant maintenance, as he testified.

As such he had two employees in his charge, John Slavick and Steve Phillips, whose work he directed.

The plant maintenance of which Newick was in charge did not include the plant production machinery, which was separately cared for as discussed *infra,* but covered all else, in the plant, including building repair and cleanliness, and maintaining the exterior, including the grass. In addition, Newick was in charge of labels and had responsibility for inventory control of labels. He did buying of materials, for which he issued purchase orders pledging the company's credit. He had separate office space, and also a special stockroom. He had a key to the plant.

Newick was paid a salary of $350 per week, whereas unit employees are paid on an hourly basis and receive less than half of this amount. He was not additionally compensated for overtime as unit employees are, and did not punch a time clock as unit employees are required to do. His year end bonus for 1977 was $1500, more than four times the amount received by unit employees. He received Blue Cross-Blue Shield and insurance coverage totally paid for by Respondent, whereas unit employees were rquired to pay half of the Blue Cross-Blue shield premiums and were not eligible for the company life insurance plan.

In connection with the employees under his direction he initialed their timecards where there were irregularities, granted permission to leave work early, and effectively recommended a pay raise for employee Slavick.

Newick reported directly to Plant Manager Doug Contreras, in his testimony, made the claim that Newick was simply a general utility man, but did not contradict the

details of Newick's testimony, as summarized above. Newick's testimony credibly refuted Contreras' claim.

I find that Stanley Newick possessed sufficient indicia of supervisory status and identity with management to be classified as a supervisor within the meaning of the Act. As such he is excluded from the bargaining unit.

Status of Bubrowski and Rechsteiner

Leonard Bubrowski had been employed by Respondent since December 1970; Robert Rechsteiner was a more recent employee, having started in May 1976.

While they described themselves as "machinists and maintenance mechanics", basically their work was to build and repair production equipment. In their terminology, building meant assembling and reassembling the parts of existing equipment into different configurations for different jobs, and testing the newly assembled equipment before it was put on the production floor. Thus their principal work was done in a separate area of the plant, away from the production floor, each at his own work bench. They appeared to work independently of each other, with Reschsteiner (sic) concentrating more than Bubrowski on new equipment.

Their supervisor was the plant engineer, Arthur Peck, who provided them with sketches and blueprints from which to assemble the equipment. Both Bubrowski and Rechsteiner had special schooling, and on the job training in other industrial plants, as machinists before coming to Respondent. Neither of them required constant

supervision by Plant Engineer Peck. They worked with special tools and needed ability to read the sketches and blueprints provided them.

Both are considerably different, in schooling, training, skills, and functions, from the production line mechanics (such as was Bernard Daly) who set up the new assemblies on the production lines and did any needed corrections of malfunctioning or breakdown that could be done in place on the floor. When the corrections could not be done on the floor, the equipment would be taken to the work bench of either Bubrowski or Rechsteiner and done there. Occasionally either one of them would try to do the needed repair work on the production floor, usually in connection with things of which he had special knowledge and the line mechanic did not (such as a compressor or certain therimage equipment).

The foregoing differences help explain the difference in compensation between machinist-mechanics Bubrowski and Rechsteiner, on the one hand, and the production and maintenance employees on the other. Bubrowski was paid a salary of $325 per week and the company paid for all of his medical and insurance coverage. Rechsteiner, much junior in point of service to Bubrowski, was hourly paid like most employees, except that his rate was $6.60 per hour about double the rate for other employees.

General Counsel contends that Bubrowski and Rechsteiner had a special status—as managerial employees—and were thereby excluded from the stipulated bargaining unit and that I should so find.

The difficulty with the contention is that while Bubrowski and Rechsteiner may have had a special status, it was not that of managerial employee, as that term or

status has been developed by the Board and the courts, but more accurately was that of technical employee.

To be a managerial employee, the employee must be one who formulates and effectuates management policies by expressing and making operative the decisions of the employer, *N.L.R.B.* v. *Bell Aerospace Company, Division of Textron,* 416 U.S. 267, 85 LRRM 2945, 2952-2953 (1974). That description does not appear to fit Bubrowski or Rechsteiner. Indeed, in unit determinations the Board has distinguished between managerial employees and technical employees, who may exercise some independent judgment in carrying out their functions but based essentially upon their technical knowledge, see for example *American Standard, Inc.,* 237 NLRB No. 8, slip. op. pp. 5-6 (1978).

If the two employees in issue were managerial employees, they would no doubt be excluded from the unit by operation of law as are supervisors, *Bell Aerospace, supra;* but technical employees are not excluded by operation of law, and under the cases are not automatically excluded from unit determinations, but may be excluded in a unit determination on a finding of lack of community of interest with the other involved employees, *The Sheffield Corporation,* 134 NLRB 1101, 1103-1105 (1961).

Here, I am not involved in a unit determination to decide what is an appropriate unit. Rather, my function is to determine whether the two challenged employees were part of the unit to which the parties stipulated as appropriate for their purposes. The parties agreed upon a unit of *all* employees except specified classes.

Appendix B

In my view Bubrowski and Rechsteiner were technical employees and as such were neither expressly excluded from the stipulated unit by the listed exclusions, such as managerial employees, professional employees, or supervisors, nor excluded by implication.[31] Adding these two employees to the unit brings the final unit count to 125 employees.

The Union Majority

At trial General Counsel produced 71 valid Union authorization cards signed by employees of Respondent. The Union had obtained 67 of them by November 11, 1977, when it made its request for recognition, and the other 4 cards came in shortly thereafter in November.[32] The cards explicitly designated the Union as the bargaining

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[31] As, for example, if the affirmative inclusion had been "all production employees" rather than "all employees," arguably there might have been an implied exclusion of technical employees, particularly those who did not share a community of interest with production employees.

[32] In addition to authentication of some of the cards by the signers, a large number were proven by a handwriting expert, comparing the signatures with signatures on records held by Respondent. The purpose of using this method was to avoid loss of working time by the employees involved and disruption of the plant's operation. The method has been sanctioned, *Aero Corporation*, 149 NLRB 1283, 1287 (1964), enf'd. 363 F.2d 702, 62 LRRM 2361 (C.A.D.C., 1966), and there was no objection to the authenticity of the 71 cards.

representative of the signatory employees. The Union had a majority of the 125 bargaining unit employees.[33]

H. *Setting Aside Election*

The Union's unresolved objections in the representation case to the conduct affecting the results of the election were encompassed in the unfair labor practices allegations of the complaint. The commission of these unfair labor practices has been established, and *a fortiori* the Union's objections to the conduct of the election have been established. These substantial violations by Respondent of Sections 8(a)(1), (3) and (4) of the Act interfered with the free choice of the unit of Respondent's employees at the Clifton plant in the December 30, 1977 election, and therefore destroyed the "laboratory conditions," *Neuhoff Bros.*

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[33] In connection with its contention that employees Linderoth, Saracco, and Gorski were supervisors, Respondent argued that their authorization cards were invalid, and any given out or obtained by them were tainted and also invalid. The argument falls, of course, with the holding above that Linderoth, Saracco, and Gorski were not statutory supervisors. Nevertheless, General Counsel has validly counterargued, with full documentation in the brief, that if the supervisory holding were the other way, while the cards of the three "assistant supervisors" would be excluded, the signed cards identified as distributed or obtained by any of the three would not be automatically tainted and eliminated; and, the facts covering these cards (referred to under heading *C* above) showing an absence of pressure or coercion, would sustain their validity, and still leave a Union majority of 68 cards in the unit reduced to 122. In view of my disposition of the supervisory contention, it would appear unnecessary to deal at length with the arguments. Respondent has not otherwise challenged the validity of the 71 authorization cards.

Packers, Inc. v. *N.L.R.B.*, 362 F.2d 611, 613 (C.A. 5, 1966), desirable for the conduct of a Board election. Accordingly, the results of the December 30, 1977 election must be set aside.

I. *Section 8(a)(5) Finding, Bargaining Order*

The question arises whether a rerun election would be an adequate remedy, or would appear to be a futile act that would permit Respondent to benefit by its misconduct in the pre-election period, requiring instead the remedy of a bargaining order under the principles enunciated in *N.L.R.B.* v. *Gissel Packing Company, Inc., supra,* 395 U.S. 575 (1969).

In *Gissel* the Supreme Court recognized two categories of unfair labor practices committed by an employer where a bargaining order would be the more appropriate remedy.

The first category involves "outrageous and pervasive" unfair labor practices, the coercive effects of which cannot be eliminated by application of traditional remedies, with the result that a fair and reliable election or rerun election cannot be had. In such cases, the Board may issue a bargaining order without inquiring whether the union possessed a card majority, 395 U.S. at 613-614.

The second category involves "less pervasive" unfair labor practices which nonetheless still have the tendency to undermine majority strength and impede the election processes. In this situation, the Board may issue a bargaining order if the union had at one point a valid majority and the Board finds that the possibility of erasing the effects of the unfair labor practices and of ensuring a fair election or rerun election by the use of traditional remedies, though present, is slight, and that employee

sentiment once expressed through cards would, on balance, be better protected by a bargaining order, 395 U.S. at 614-615.

In the case at bar, upon becoming aware that the Union had begun organizing and was seeking representative status, Respondent engaged in a campaign designed to thwart the organizing and destroy any majority the Union may have succeeded in obtaining. Commencing about two weeks before the Union requested recognition on November 11, 1977, Respondent engaged in Section 8(a)(1) interrogation of the leading union proponent among the employees concerning organizing, then discharged him, and a coworker associated with him in organizing activity, in violation of Section 8(a)(3), and launched a countercampaign against the Union affecting all employees, starting with "captive audience" employee meetings used to convey its antiunion hostility and to sound warnings of the dire consequences of bringing in the Union. When the Union requested and was refused recognition on November 11, it had a valid card majority of 67 in the unit of 125 employees, which was later increased to a majority of 71.

Respondent continued its countercampaign during November and December until the election of December 30, with its president interviewing every employee on the plant floor between one and five times each, followed by a final "captive audience" speech; and by its vice president, plant manager, department heads, and shift foremen engaging in discussions with employees on and off the plant floor. In the course of this barrage of campaigning against the Union, Respondent's officers and supervisors overstepped the bounds of legality many times. Employees were promised benefits and correction of solicited grievances if they would forget the Union, and threatened with

no correction of grievances and loss of jobs if they brought the Union in. A substantial group of employees, not entitled to year end bonuses under Respondent's written policy, were paid a bonus along with the other employees just prior to the election. Respondent illegally interfered with the employees' self organizational rights by coercive interrogation concerning their Union interest, interference with wearing of Union insignia, interference with employee solicitation of Union memberships and distribution of Union literature by promulgation and enforcement of illegal rules, coercion to induce influential employees to induce other employees to cease Union support, threatening discharge of three leading Union supporters unless they ceased Union activities under a sham claim that they were supervisors, and disciplining three employees for attendance at a Board conference to assist the Union on the representation petition.

In sum, Respondent sought to impress upon the employees the futility of voting the Union in, and that there would be harsher dealing and reprisal if they did. The mass of violations of Section 8(a)(1), (3), and (4) of the Act were egregious unfair labor practices, which had the tendency to undermine, and undermined, the Union's majority strength in the election of December 30, 1977, and prevented the holding of a fair election.

By refusing to recognize and bargain with the Union, as requested on November 11, 1977, and instead engaging in this course of unlawful conduct which undermined the Union's majority status and prevented the holding of a fair election, Respondent also violated Section 8(a)(5) of the Act, *Trading Port, Inc.*, 219 NLRB 298, 300-301 (1975).

Appendix B

Under the circumstances of this case, the sentiment of the unit employees expressed through the Union authorization cards is a more reliable measure of their desires on the issue of representation than the election, held December 30, 1977. To remedy Respondent's unfair labor practices, including its Section 8(a)(5) refusal to bargain, a bargaining order is necessary, whether the violations be viewed as category one unfair labor practices under *Gissel, supra,* see *J. P. Stevens & Co., Inc., Gulistan Division* v. *N.L.R.B.,* 441 F.2d 514, 521-522 (C.A. 5, 1971), cert. denied 404 U.S. 830, or as category two unfair labor practices, see *N.L.R.B.* v. *Kaiser Agricultural Chemicals etc.,* 473 F.2d 374, 382-383 (C.A. 5, 1973). The bargaining order will be issued as of the end of October 1977, when Respondent embarked on its course of unlawful conduct.[34]

Conclusions of Law

1. In October-December 1977, by soliciting grievances and promising benefits and correction of grievances if the employees would forget the Union, and by threatening no correction of grievances and loss of jobs if they brought the Union in; by granting bonus benefits, just proir to the election; by coercive interrogation of employees concerning organizing, who supplied Union cards, and employee interest in the Union; by interfering with the employees wearing Union insignia; by promulgating and enforcing

---

[34] This date, though earlier than the November 11 date of refusal of recognition, is more comprehensive and justified under *Trading Port, supra,* 219 NLRB at 301, and see *Broadmoor Lumber Co.,* 227 NLRB 1123, note 2 (1977), commenting on a similar point.

rules prohibiting solicitation by employees of Union memships in plant work areas on nonwork time, and distribution of Union literature by employees in nonwork areas during nonwork time; by coercion to induce or attempt to induce influential employees to induce other employees to cease Union support; and by instructing nonsupervisory employees, under threat of discipline, to cease support of the Union, Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

2. By discharging employees Bernard Daly and Eleanor Ott on November 2, 1977, because of their Union activity and to discourage employees interest and membership in the Union, Respondent engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act. The change of their discharge, on November 16, 1977, to suspension without pay for the prior two weeks, reduced the severity of the discriminatory action but continued the violation of Section 8(a)(3) and (1) of the Act.

3. By suspending for one day without pay, on November 29, 1977, employees Michael Roberts, Robert Linderoth, and Eleanor Ott, because they attended a Board conference to assist the Union with the representation petition, Respondent engaged in unfair labor practices in violation of Section 8(a)(4) of the Act.

4. By refusing to recognize and bargain with the Union as representative of a majority of the employees as requested on November 11, 1977, but instead engaging, from the end of October to the end of December 1977, in commission of the unfair labor practices enumerated in paragraphs 1, 2 and 3 above, Respondent undermined the

majority in the unit of employees that the Union represented, and made impossible the holding of a fair representation election. Respondent's refusal to bargain and embarking upon this course of misconduct constituted an unfair labor practice in violation of Section 8(a)(5) of the Act.

5. The described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent's pre-election unfair labor practices nullified the results of the December 30, 1977 representation election, and these unfair labor practices cannot be corrected by conventional remedies, including a rerun election. Accordingly, it is appropriate and necessary that Respondent be ordered to bargain with the Union as of the end of October 1977, when it first embarked upon its course of misconduct to undermine the Union majority and prevent the holding of a fair election.

The Remedy

It will be recommended that the Respondent

(1) cease and desist from its unfair labor practices;

(2) give backpay to employees Daly and Ott for the time of their suspensions, November 2-16, 1977, and to employees Roberts, Linderoth, and Ott for the day of their suspensions, November 29, 1977, said backpay to be computed on a quarterly basis as set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), approved in *N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U.S. 344 (1953), with interest as

prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977);[35]

(3) bargain with the Union, upon its request;

(4) post the notices provided for herein;

and because the Respondent violated fundamental employee rights guaranteed by Section 7 of the Act, and because there appears from the manner of the commission of this conduct an attitude of opposition to the purposes of the Act and a proclivity to commit other unfair labor practices, it will be further recommended that the Respondent

(5) cease and desist from in any manner infringing upon the rights guaranteed by Section 7 of the Act. *N.L.R.B.* v. *Entwistle Mfg. Co.*, 120 F.2d 532, 536 (C.A. 4, 1941); *P. R. Mallory and Co.* v. *N.L.R.B.*, 400 F.2d 956, 959-960 (C.A. 7, 1968), cert. denied 394 U.S. 918.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, there is hereby issued the following recommended;[36]

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[35] See generally, *Isis Plumbing and Heating Co.*, 138 NLRB 716 (1962).

[36] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Appendix B

ORDER

Respondent, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Coercively interrogating employees as to their Union organizing, as to who is supplying them with Union cards, and as to their interest in the Union.

(b) Threatening employees with loss of jobs if employees bring in the Union.

(c) Threatening no correction of grievances if employees bring in the Union.

(d) Discharging, suspending, or otherwise disciplining employees for engaging in Union activities.

(e) Soliciting grievances and promising benefits or correction of grievances to induce employees to abandon the Union.

(f) Granting bonuses or other benefits to induce employees to abandon the Union.

(g) Interfering with employees' wearing of Union insignia.

(h) Instructing employees under threat of discipline to desist from engaging in Union activities.

(i) Promulgating or enforcing rules prohibiting solicitation by employees of Union memberships in plant work

areas on nonwork time, or distribution of Union literature by employees in nonwork areas during their nonwork time.

(j) Coercively inducing or attempting to induce influential employees to induce other employees to cease support of the Union.

(k) Suspending or otherwise disciplining employees for attending Board conferences to assist the Union in connection with Union representation of the employees.

(l) Discouraging employees from support of, or membership in, the Union or other labor organization, by discharge, suspension, or other discrimination affecting their tenure or other condition of employment.

(m) Refusing, upon request, to bargain with the Union as the exclusive collective bargaining representative of the unit of Respondent's Clifton plant employees described under heading *G* of this decision.

(n) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, as of the end of October 1977, bargain collectively with the Union as the exclusive collective bargaining representative of the above described unit of Respondent's Clifton plant employees, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody the agreement in a written contract.

(b) Make employees Bernard Daly and Eleanor Ott whole, in the manner set forth in the section of the decision entitled "The Remedy," for any loss of earnings incurred by each as a result of their discharge reduced to suspension from November 2 to 16, 1977, and in the same manner make employees Michael Roberts, Robert Linderoth, and Eleanor Ott whole for the loss of earnings incurred by each as a result of their suspension for the day of November 29, 1977; and expunge from Respondent's records references to any discipline of such persons on these occasions.

(c) Preserve, and, upon request, make available to the Board and its agents, for examination and copying, all payroll and related records necessary to ascertain the backpay due under the terms of this order.

(d) Post in the Clifton, New Jersey plant copies of the attached notice marked "Appendix."[37] Immediately upon receipt of said notice, on forms to be provided by the Regional Director of Region 22 (Newark, New Jersey) Respondent shall cause the copies to be signed by one of its authorized representatives and posted, the posted copies to be maintained for a period of sixty consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that

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[37] In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 22, in writing, within twenty days from the date of this order, what steps the Respondent has taken to comply herewith.

Dated, Washington, DC October 9, 1979

HERZEL H. E. PLAINE
Administrative Law Judge

Appendix B

APPENDIX

NOTICE TO EMPLOYEES

(Opposite) ☛

FORM NLRB-4727
(9-69)

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

THE NATIONAL LABOR RELATIONS BOARD HAVING FOUND, AFTER A TRIAL, THAT WE VIOLATED THE NATIONAL LABOR RELATIONS ACT:

WE WILL NOT coercively interrogate employees concerning Union organizing, or who supplied Union cards, or the employees' interest in the Union.

WE WILL NOT threaten employees with loss of jobs if they bring the Union into the plant.

WE WILL NOT threaten employees that there will be no correction of grievances if employees bring the Union into the plant.

WE WILL NOT discharge, suspend, or otherwise discipline employees for engaging in Union activities.

WE WILL NOT solicit grievances and promise benefits or correction of grievances to induce employees to abandon the Union.

WE WILL NOT grant bonuses or other benefits to induce employees to abandon the Union.

WE WILL NOT interfere with employees' wearing of Union insignia.

WE WILL NOT instruct employees, under threat of discipline, to desist from engaging in Union activities.

WE WILL NOT promulgate or enforce rules prohibiting solicitation by employees of Union memberships in plant work areas on nonwork time, or distribution of Union literature by employees in nonwork areas during nonwork time.

WE WILL NOT coercively induce or attempt to induce influential employees to induce other employees to cease support of the Union.

WE WILL NOT suspend or otherwise discipline employees for attending National Labor Relations Board conferences to assist the Union in connection with Union representation of the employees.

WE WILL NOT discourage employees from support of, or membership in, the Union or other labor organization by discharge, suspension, or other discrimination affecting their tenure or other condition of employment.

WE WILL NOT refuse, upon request, to bargain with the Union as the exclusive collective bargaining representative of the bargaining unit of our Clifton plant employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act.

WE WILL, upon request, as of the end of October 1977, bargain with the Union (DISTRICT 65, DISTRIBUTIVE WORKERS OF AMERICA) as the exclusive collective bargaining representative of the bargaining unit comprising all of our employees employed at the Clifton, New Jersey facility but excluding all office clerical employees, professional employees, managerial employees, guards, assistant supervisors and all other supervisors as defined in the Act; and if an agreement is reached, embody it in a written contract.

BECAUSE the Board found that we unlawfully discharged employees Bernard Daly and Eleanor Ott on November 2, 1977, and then reduced the discharge to unlawful suspension for each to November 16, 1977, and also unlawfully suspended employees Michael Roberts, Robert Linderoth, and Eleanor Ott for one day on November 29, 1977,

WE WILL give each of them backpay with interest for the respective times of their suspensions, and

WE WILL expunge from our records any references to discipline of these employees in connection with the occasions for these suspensions.

PERMANENT LABOR CORPORATION
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Peter D. Rodino, Jr. Fed. Bldg. - Room 1600, 970 Broad Street, Newark NJ 07102 (Tel. No. (201) 645-3652).

Appendix B

APPENDIX C

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

PERMANENT LABEL CORPORATION,

Respondent.

JUDGMENT

Before: SEITZ, Chief Judge, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, and SLOVITER, Circuit Judges.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for the enforcement of an order, as amended issued by it against the Respondent, Permanent Label Corporation, Clifton, New Jersey, its officers, agents, successors, and assigns on March 4, 1980. The Court heard argument of respective counsel on May 11, 1981, and has considered the briefs and transcript of record filed in this cause. On June 30, 1981, the Court,

being fully advised of the premises, handed down its opinion granting enforcement of the Board's Order.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Appeals for the Third Circuit that the said order, as amended, of the National Labor Relations Board in said proceeding be enforced, and that Permanent Label Corporation, Clifton, New Jersey, its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED that costs shall be taxed against the Respondent.

BY THE COURT

SEITZ
Circuit Judge

Dated: August 14, 1981

Certified as a true copy and issued in lieu
of a formal mandate on September 3, 1981.

Test;

M. ELIZABETH FERGUSON

Chief Deputy Clerk, United States Court of
Appeal for the Third Circuit.

APPENDIX D

28 U.S.C. Section 1254(1)

§ 1254. COURTS OF APPEALS; CERTIORARI; APPEAL; CERTIFIED QUESTIONS

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

• • •

Appendix D

Section 10(f) of the National Labor Relations Act, as Amended, 29 U.S.C. 160(f)

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Appendix D

National Labor Relations Act, as Amended, 29 U.S.C. Section 158(a)(1), (3), (4) and (5)

§ 158. UNFAIR LABOR PRACTICES

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

• • •

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

• • •

Appendix

NO. 81-915

Office - Supreme Court
FILED
NOV 27 1981
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PERMANENT LABEL CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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SUPPLEMENTAL APPENDIX

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NO. 81-915

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PERMANENT LABEL CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

APPENDIX E

Designation of Corporate Relationships

Permanent Label Corporation, filing this petition for a writ of certiorari as petitioner in this proceeding, states that:

This is its original Designation of Corporate Relationships.

Permanent Label Corporation is not owned by any parent corporation.

Permanent Label Corporation does not have an ownership interest in any subsidiaries.

The only affiliate of Permanent Label Corporation is Corona Plastics, Inc., Denville, New Jersey.

Opposition

Office - Supreme Court, U.S.
FILED
JAN 19 1982
ALEXANDER L. STEVAS
CLERK

No. 81-915

In the Supreme Court of the United States

OCTOBER TERM, 1981

PERMANENT LABEL CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

REX E. LEE
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QUESTION PRESENTED

Whether the Board reasonably concluded that petitioner's violations of the National Labor Relations Act—which included discriminatory discharges, suspensions for attending a Board conference on behalf of the Union, threats of job loss, and numerous other unfair labor practices—precluded the holding of a fair election and therefore warranted the issuance of a bargaining order based on authorization cards.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statute involved 1

Statement 2

Argument 8

Conclusion 14

TABLE OF AUTHORITIES

Cases:

Bandag, Inc. v. *NLRB*, 583 F. 2d 765 12

Justak Bros. & Co. v. *NLRB*, No. 81-1132 (7th Cir. Nov. 25, 1981) 11, 12

NLRB v. *American Cable Systems, Inc.*, 427 F. 2d 446, remanding 179 N.L.R.B. 846, cert. denied, 400 U.S. 957 12

NLRB v. *Gissel Packing Co.*, 395 U.S. 575 ..... 5, 8, 9, 11, 12, 13

NLRB v. *Jamaica Towing Co.*, 632 F. 2d 208 10-11

NLRB v. *Naum Bros.*, 637 F. 2d 589 12

NLRB v. *Rexair, Inc.*, 646 F. 2d 249, aff'g in part and rev'g in part 243 N.L.R.B. 876 12

NLRB v. *Wilhow Corp., d/b/a Town & Country Supermarkets*, No. 80-1078 (10th Cir. Dec. 7, 1981) 11

Page

Cases—Continued:

New Alaska Development Corp. v. *NLRB*, 441 U.S. 491 12

Rapid Manufacturing Co. v. *NLRB*, 612 F. 2d 144 13

Sinclair Co., 164 N.L.R.B. 261 9-10

Wisniewski v. *United States*, 353 U.S. 901 10

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* 1

Section 8(a)(1), 29 U.S.C. 158(a)(1) 4, 6, 7
Section 8(a)(3), 29 U.S.C. 158(a)(3) 4, 6
Section 8(a)(4), 29 U.S.C. 158(a)(4) 4, 6, 7
Section 8(a)(5), 29 U.S.C. 158(a)(5) 5

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-915

PERMANENT LABEL CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 36a-82a) is reported at 657 F. 2d 512. The prior decision of a panel of the court of appeals (Pet. App. 1a-33a) is reported at 106 L.R.R.M. 2211. The Board's decision and order (Pet. App. 83a-185a) is reported at 248 N.L.R.B. 118.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1981 (Pet. App. 186a-187a). The petition for a writ of certiorari was filed on November 12, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. 190a.

STATEMENT

1. In the fall of 1977,[1] the Union[2] initiated an organizing campaign at petitioner's plant in Clifton, New Jersey. Employees Bernard Daly and Eleanor Ott were leading organizers at the plant. In late October, Supervisor Michael Bevilacqua became aware of the union activity in the plant and confronted Daly with this information.[3] Daly denied any knowledge of the organizing activities. Shortly thereafter, on November 1, 1977, Daly was summarily discharged by petitioner, allegedly for excessive absenteeism. Ott was similarly discharged the next day (Pet. App. 38a).[4]

On November 4, Company Vice-President Robert Tancredi met with employees on each of the plant's three shifts and delivered a speech expressing petitioner's opposition to the Union, after which the employees were invited to remain and discuss their grievances (Pet. App. 38a-39a, 133a-134a). The employees continued their organizing effort, however, and, on November 11, they presented petitioner with Union authorization cards signed by 67 of the plant's 125 employees,[5] and requested petitioner to recognize and bargain with the Union. Petitioner refused, and thereafter intensified its efforts to thwart the employees' organizing activity and to defeat the Union in the election scheduled for December 30 (*id.* at 39a-40a, 120a).

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[1]All dates are in 1977 unless otherwise noted.

[2]District 65, United Automobile Workers, formerly District 65, Distributive Workers of America.

[3]Daly initially became involved in organizing activity in February 1977, but he ceased his efforts at that time after Bevilacqua warned him that he could be fired for talking about the Union in the plant. Daly resumed his organizing activity in September 1977 (Pet. App. 38a).

[4]Following unfair labor practice charges filed by the Union, Daly and Ott were reinstated, without backpay, on November 15 (Pet. App. 39a).

[5]Within the next two weeks the Union obtained authorization cards from four more employees (Pet. App. 171a).

On November 18, Bevilacqua stopped an employee who was carrying a Union authorization card and asked who had given her the card. Later that day, Bevilacqua called the employee organizer responsible for distributing the cards into his office and told her that she could not pass out authorization cards on Company time or on Company property. On November 29, Supervisor Robert Sanders threatened disciplinary action against an off-duty employee who was distributing campaign leaflets in a nonwork area. As a result, the employee ceased distributing Union materials. Later that day, Tancredi ordered that three employees who, on behalf of the Union, were attending a Board conference with representatives of petitioner be suspended for the day rather than permitting them to report five or ten minutes late for work after the conference ended. One week later, Plant Manager Douglas Contreras informed three employee organizers that petitioner considered them to be supervisors and ordered them to cease working for the Union or face action by petitioner (Pet. App. 40a-42a).

Petitioner's campaign to defeat the Union in the election was led by its President, Al Contreras. During the month of December, Contreras, who normally spent little time at the Clifton plant, had approximately 500 individual conversations with employees in an attempt to persuade them to vote against the Union. During these conversations, Contreras coercively interrogated employees about their support for the Union, solicited grievances, coerced employees to campaign against the Union, discouraged employees from wearing Union buttons, promised benefits to employees if they would vote against the Union, and threatened employees with reprisals and other adverse economic consequences both for themselves and the Company, implying the possibility of the plant's closing, if the Union won the election. One week before the scheduled election, Contreras gave year-end bonuses to all the employees, including some who

were not eligible for such a bonus under petitioner's written bonus policy. Finally, on December 28, only two days before the election, Contreras told the employees, in a prepared speech, that the Company's economic growth would be hindered if the Union won the election and implied that it would lose the business of its largest customer if the Union were victorious (Pet. App. 6a-7a, 42a-43a).

On December 30, the Union lost the representation election by a vote of 65-54 (Pet. App. 7a, 43a).

2. Adopting the decision of the administrative law judge, the Board found that petitioner, upon learning of the Union's organizing activity in the plant, "engaged in a campaign designed to thwart the organizing and destroy any majority the Union may have succeeded in obtaining," and that these efforts continued up to the time of the representation election (Pet. App. 85a-87a, 174a). The Board found that petitioner violated Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), by discharging employees Daly and Ott for having initiated the organizing activity in the plant (*id.* at 158a-164a, 177a), and violated Section 8(a)(4) of the Act by suspending three employees for having attended a Board representation conference on behalf of the Union (*id.* at 164a-165a, 177a). In addition, the Board found that petitioner, through its top management officials, committed approximately 30 violations of Section 8(a)(1) of the Act during the campaign by (1) coercively interrogating employees concerning their support for the Union, (2) threatening reprisals, plant closure, job loss, and other adverse economic consequences if the Union were selected as bargaining representative, (3) soliciting grievances and implying that those grievances would be corrected without the Union, (4) promising benefits to induce employees to vote against the Union, (5) coercing employees to campaign against the Union, (6) discouraging employees from wearing Union buttons, (7) enforcing unlawful no-solicitation

and no-distribution rules, (8) instructing non-supervisory employees, under threat of discharge, to cease working for the Union, and (9) granting a year-end bonus to employees shortly before the election to induce the employees to renounce the Union (*id.* at 132a-158a, 176a-177a). The Board also found that petitioner violated Section 8(a)(5) of the Act by refusing to bargain with the Union and, instead, engaging in the above unlawful course of conduct (Pet. App. 173a-175a, 177a-178a).

Applying this Court's decision in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), the Board concluded (Pet. App. 175a-176a) that petitioner

> sought to impress upon the employees the futility of voting the Union in, and that there would be harsher dealing and reprisal if they did. The mass of violations of Section 8(a)(1), (3) and (4) of the Act were egregious unfair labor practices, which had the tendency to undermine, and undermined, the Union's majority strength in the election of December 30, 1977, and prevented the holding of a fair election.
>
> * * * * *
>
> Under the circumstances of this case, the sentiment of the unit employees expressed through the Union authorization cards is a more reliable measure of their desires on the issue of representation than the election * * *. To remedy [petitioner's] unfair labor practices, including its Section 8(a)(5) refusal to bargain, a bargaining order is necessary, whether the violations be viewed as category one unfair labor practices under *Gissel* * * * or as category two unfair labor practices * * *.

The Board further held that "these unfair labor practices cannot be corrected by conventional remedies, including a rerun election" (*id.* at 178a), and that issuance of a

bargaining order based on the Union's authorization card majority was warranted since a rerun election "would appear to be a futile act that would permit [petitioner] to benefit by its misconduct in the pre-election period" (*id.* at 173a).

3. A panel of the court of appeals upheld the Board's findings of violations of Section 8(a)(1), (3) and (4) (Pet. App. 8a-13a), agreeing with the Board that these were "pervasive unfair labor practices" (*id.* at 14a). With respect to the question of relief, however, the panel, with Chief Judge Seitz dissenting, held that the Board had not sufficiently articulated the reasons why a bargaining order was necessary and therefore remanded the case to the Board for "specific findings" concerning the impact of the unfair labor practices on the election process and the likelihood of a fair rerun election (*id.* at 14a-16a).

On the Board's petition for rehearing, the court of appeals vacated its initial decision (Pet. App. 34a) and, sitting en banc, enforced the Board's bargaining order (*id.* at 36a-53a). The court expressly recognized (*id.* at 47a) the requirement that, "when the Board imposes a bargaining order, it must articulate the factors that justify the choice of this remedy over the ordering of a new election," and held (*id.* at 52a) that the ALJ's "statement of reasons in this case [, which the Board adopted,] is more than sufficient" to enable the reviewing court to determine whether the Board's choice of remedy was appropriate. The court explained (*id.* at 52a-53a):

> In this case the ALJ did not merely state conclusorily that the bargaining order should issue. Instead, he demonstrated that the violations were widespread, thus indicating [petitioner's] proclivity to exceed the limits of the law in its attempt to prevent unionization. He also explained that high-level officers, including the president and vice president, had threatened reprisals, coercively interrogated employees, and illegally promised

benefits. Moreover, he demonstrated that each employee in the plant was not only interviewed individually by the president but was also subjected to "captive audience" speeches. Therefore, he found that a bargaining order was necessary to remedy these extensive unfair labor practices.

The court concluded (Pet. App. 53a):

> We do not believe enforcement should be denied merely because the ALJ did not write down the inescapable inference he made in recommending that a bargaining order issue—that merely ordering [petitioner] to refrain from future violations would not erase the effects of these threats and other egregious violations from the employees' memories, and thus that the possibility of a fair rerun election was slight.
>
> We believe that it is sufficient for the ALJ to provide an extensive list of the factors giving rise to his recommendation that a bargaining order be issued, as was done in this case. If we were to require that the ALJ also specifically state each inference drawn from these factors, no matter how obvious it is from the opinion, we would elevate form over substance and overstep the appropriate limits of judicial review of the Board's choice of remedy.

The court also rejected petitioner's contention that the Board's choice of a bargaining order remedy was improperly based on misconduct that occurred prior to the Union's November 11 demand for recognition.[6] The court recognized

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[6] As we have shown above (pages 2-4, *supra*), prior to the demand for recognition, petitioner unlawfully interrogated employee Daly, unlawfully discharged Daly and Ott for their organizing activity, and unlawfully solicited grievances from its employees. Following the recognition demand, petitioner committed approximately 30 violations of Section 8(a)(1) and (4) of the Act in its determined effort to thwart the Union's organizing campaign and to defeat the Union in the representation election.

(Pet. App. 48a) that a union's efforts to obtain majority support among employees is a "continuing process" and that "in some circumstances the Board may properly consider unlawful conduct that occurred before the Union demanded recognition in determining whether the employer's course of unlawful conduct was sufficiently pervasive" to warrant a bargaining order remedy. The court noted (*ibid.*) that petitioner's "course of unlawful conduct" began approximately two weeks prior to the Union's demand for recognition, at a time when the Union "had already obtained a significant number of authorization cards." This course of conduct continued with increased intensity up until the time of the election (*id.* at 40a-43a, 120a). In these circumstances, the court concluded (*id.* at 48a), it was not improper for the Board to rely "on both premajority and postmajority conduct" in evaluating the need for a bargaining order.[7]

ARGUMENT

1. The first question raised in the petition (Pet. i)—whether the Board is "required to articulate its findings" on which entry of a *Gissel* bargaining order is based—is not presented by this case. The majority and dissenting court of

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[7]Judge Aldisert, concurring, disagreed with the majority's holding that the Board was required to "articulate in detail the factors that justify its choice of" a bargaining order over a new election (Pet. App. 54a). In Judge Aldisert's view (*id.* at 57a-60a), the Board is not required to provide any different articulation of its reasons for imposing a *Gissel* bargaining order than for any other type of order. Thus, all that is required is that reviewing courts be able to ascertain that the Board has properly exercised its broad discretion to devise appropriate remedial orders (*ibid.*).

Judge Garth, whose partial dissent was joined by Judges Hunter and Weis, agreed with the majority that the Board is required to articulate the basis for *Gissel* bargaining orders (Pet. App. 68a-69a). The dissenters, however, were not satisfied with the Board's articulation in this case (*id.* at 70a, 76a-82a).

appeals judges agreed that such an articulation is required; only the concurring judge urged the contrary view (see note 7, *supra*). Accordingly, the only issue presented here is whether the Board's articulation in this case was adequate. The court of appeals' conclusion (Pet. App. 52a) that the Board's articulation was "more than sufficient" is consistent with this Court's decision in *Gissel, supra,* creates no conflict among the circuits, and is exceedingly factbound. Further review by this Court therefore is not warranted.

The Court in *Gissel* approved the use of bargaining orders in cases in which the Board finds that at one point the Union had a majority, that the employer's conduct has had a "tendency to undermine majority strength and impede the election processes," and that therefore "employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order * * *" (395 U.S. at 614-615). Here, the Board found that petitioner exhibited a proclivity to violate the rights of its employees, that petitioner's highest corporate officers had engaged in this unlawful conduct, and that each of the unit employees had been subjected to petitioner's coercive tactics. The Board further found that petitioner's course of unlawful conduct was designed to destroy the Union's majority support and to impress upon its employees the futility and consequences of voting for the Union (Pet. App. 174a-176a). Nothing in *Gissel* suggests that the Board is required to support a bargaining order with greater specificity.[8]

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[8]Indeed, in the only case of the four covered by the Court's *Gissel* opinion that was enforced without remand, the reasons supporting the bargaining order were less specific than those given by the Board in this case. That case was *Sinclair Co.*, 164 N.L.R.B. 261 (1967), in which the trial examiner, whose decision was adopted by the Board, held that the employer violated Section 8(a)(1) of the Act by threatening that unionization could lead to closing of the plant. The trial examiner then concluded, drawing inferences from the nature of the unfair labor

The decisions of the other courts of appeals are to the same effect.[9] In *NLRB* v. *Jamaica Towing Co.*, 632 F. 2d 208, 212-213 (1980) (footnotes omitted), the Second Circuit recognized that such " 'hallmark' " violations as "threats of plant closure or loss of employment, the grant of benefits to employees, or the * * * discharge of union adherents in violation of § 8(a)(3) of the Act" have been "regularly regarded by the Board and the courts as highly coercive" and that the "seriousness of [such] conduct, coupled with

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practices, that a bargaining order was appropriate (164 N.L.R.B. at 269):

> As previously found, the Union represented a clear majority of the [employees] when [the employer] began its unlawful campaign directed at destroying that majority. To the extent that the election revealed a loss of union support thereafter, such loss must be found attributable to the [employer's] unfair labor practices. Therefore, effectuation of the policies of the Act would * * * require such a bargaining order in order properly to remedy [the employer's] other unfair labor practices herein found.

[9]Contrary to petitioner's assertion (Pet. 12 n.5), the Third Circuit has not "waver[ed]" on the question whether the Board must articulate its rationale for issuing a bargaining order. As the en banc court noted (Pet. App. 47a),

> it is established, at least in this circuit, that when the Board imposes a bargaining order, it must articulate the factors that justify the choice of this remedy over the ordering of a new election. See, *e.g.*, *Hedstrom Co.* v. *NLRB*, 558 F. 2d 1137 (3d Cir. 1977); *NLRB* v. *Armcor Industries, Inc.*, 535 F. 2d 239 (3d Cir. 19[76]). If the ALJ provides a statement of reasons for recommending that the Board impose a bargaining order, the Board need only specifically adopt the findings and reasoning of the ALJ. A separate articulation by the Board of the reasons for imposing a bargaining order is unnecessary. See *Kenworth Trucks* v. *NLRB*, 580 F. 2d 55, 62-63 (3d Cir. 1978).

In any event, even if there were an intra-circuit conflict, such a conflict would not warrant review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

the fact that often it represents complete action as distinguished from mere statements, interrogations or promises, justifies a finding without extensive explication that it is likely to have a lasting inhibitive effect on a substantial percentage of the work force."[10] See also *NLRB* v. *Wilhow Corp., d/b/a Town & Country Supermarkets*, No. 80-1078 (10th Cir. Dec. 7, 1981). Similarly, in *Justak Bros. & Co.* v. *NLRB*, No. 81-1132 (Nov. 25, 1981), the Seventh Circuit recognized (slip op. 12) that the requirement that the Board state the reasons justifying its choice of a bargaining order does not call for "[e]laborate explanations * * *; indeed, scientific accuracy in estimating the impact of unfair labor practices is impossible." The Court went on to sustain a *Gissel* bargaining order, stating (*id.* at 13):

> The Board noted that from the very start of the Union's organizing campaign, the Company engaged in a systematic campaign of unfair labor practices designed to destroy the Union's support. * * * These unfair labor practices were committed by almost all the Company's supervisors, including its highest corporate official. Moreover, the Company has made no effort to neutralize the effect of its threats of layoff, discharge, shutdown, and deportation. Common sense recognizes the dramatic and long term effects of such threats.

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[10]By contrast to the implied threat of plant closure, actual discharge of two Union activists and suspension of three other employees and grants of year-end bonuses to employees who were not eligible for them that occurred in the present case, there were no such "complete" actions taken in *Jamaica Towing*, in which the court of appeals refused to enforce a bargaining order (see 632 F. 2d at 216) ("[t]here was no plant closure or threat of closure, no actual grant of benefits, no discharge of employees or even threats of discharge in reprisal for union adherence * * *").

This reasoning is equally applicable to the present case.[11]

2. Finally, contrary to petitioner's suggestion (Pet. 10-12), there is nothing in this Court's decision in *Gissel* or elsewhere that prevents the Board from considering an employer's total course of unlawful conduct—both premajority and postmajority—in evaluating whether such conduct tended to undermine majority strength.[12] Indeed,

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[11] *New Alaska Development Corp.* v. *NLRB*, 441 F. 2d 491 (7th Cir. 1971), on which petitioner relies (Pet. 14), involved only threats violative of Section 8(a)(1) directed at five employees. The violations here, like those in *Justak Bros., supra*, are more serious and extensive. Similarly, in *NLRB* v. *Rexair, Inc.*, 646 F. 2d 249 (6th Cir. 1981), the bargaining order was supported only by minor unfair labor practices, not including, as the present case does, actual suspensions and discharges (see 243 N.L.R.B. 876 (1979)). Moreover, in *Rexair*, the ALJ, whose decision was adopted by the Board, did not explicate the basis for the bargaining order beyond the conclusionary statement that the possibility of erasing the effects of the unfair labor practices was slight and those violations could be remedied only by a bargaining order (see 646 F. 2d at 251; 243 N.L.R.B. at 885-886). Compare *NLRB* v. *Naum Bros.*, 637 F. 2d 589 (1981), in which the Sixth Circuit enforced a bargaining order without requiring any more detailed an explanation than that which the Board provided here (see *id.* at 592), where the employer had implied that unionization might result in the plant's closure and had discharged and refused to reinstate an employee in order to discourage union activities. In *NLRB* v. *American Cable Systems, Inc.*, 427 F. 2d 446 (5th Cir.), cert. denied, 400 U.S. 957 (1970), the Board had attempted to support the issuance of a bargaining order with a mere "litany, reciting conclusions by rote without factual explication" (427 F. 2d at 449; see 179 N.L.R.B. 846 (1969)). Compare the Fifth Circuit's subsequent enforcement of a bargaining order in *Bandag, Inc.* v. *NLRB*, 583 F. 2d 765, 771 n.8 (1978) ("[t]he exact language used is unimportant * * * as long as the findings [that a fair rerun election cannot be held and that a bargaining order would protect employee sentiments] were based on substantial evidence regarding both issues").

[12] To the contrary, the Court stated in *Gissel, supra*, 395 U.S. at 614, that where there is a showing "that at one point the union had a majority * * * the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future." Petitioner's *ipse dixit* is supported neither by case law nor by logic. There is

in two of the three cases remanded by the Court in *Gissel*, the employer had followed the classic pattern, which petitioner also followed in this case, of attempting to interfere with the union's organizing efforts at the outset and then, after the demand for recognition, continuing or escalating its unlawful conduct in an attempt to defeat the union in the election. 395 U.S. at 580 & n.1, 582 n.3. In remanding those cases to the Board for findings on the propriety of entering a bargaining order, the Court in no way suggested that any distinction should be made between pre- and postmajority unfair labor practices. See 395 U.S. at 616.

Petitioner's reliance (Pet. 11-12) on *Rapid Manufacturing Co.* v. *NLRB*, 612 F. 2d 144, 146-150 (3d Cir. 1979) is misplaced. The en banc court of appeals characterized that prior decision as follows (Pet. App. 48a):

> According to [petitioner], *Rapid Manufacturing Co.* prohibits the Board from supporting a *Gissel* II bargaining order by relying on conduct that occurred before the Union demanded recognition. We do not read *Rapid Manufacturing Co.* this broadly. Obtaining a majority of Union authorization cards is a continuing process, and the length of time it takes to achieve a majority varies from plant to plant, often depending on the number of employees involved. We believe that in some circumstances the Board may properly consider unlawful conduct that occurred before the Union demanded recognition in determining whether the employer's course of unlawful conduct was sufficiently pervasive to undermine the Union's majority support and to make the possibility of a fair

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no reason to believe that majority strength that developed in spite of the existence of premajority misconduct could not subsequently be undermined by the combination of premajority and postmajority misconduct on the part of the employer.

rerun election slight, and thus to support the imposition of a *Gissel* II bargaining order. Forbidding the Board from considering such conduct sets an artificial time barrier and ignores the possible cumulative effect of antiunion activity.

As noted above (see pages 7-8, *supra*), the court concluded (Pet. App. 48a) that the circumstances of the present case warranted the imposition of a bargaining order on the basis of both premajority and postmajority misconduct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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